DOCUMENT RESUME

ED 193 741 EA 012 495

AUTHOR Lewis, Larry
TITLE Critical Issues in School Law.
INSTITUTION Oklahoma State School Boards Assoc., Oklahoma City.
PUB DATE 79
NOTE 78p.

EDRS PRICE MF01/PC04 Plus Postage.
DESCRIPTORS Boards of Education; *Civil Liberties; Competence; Constitutional Law; Corporal Punishment; Court Litigation; Due Process; *Educational Legislation; Elementary Secondary Education; Ethics; Job Performance; Legal Responsibility; *School Law; Search and Seizure; *Student Rights; Suspension; *Teacher Behavior; *Teacher Dismissal; Teachers
IDENTIFIERS Oklahoma

ABSTRACT

This publication summarizes and explains education-related court decisions in an effort to supply school people with guidelines in determining how school law applies to specific situations in their school districts. Although there is some emphasis on Oklahoma law, cases cited originated in all parts of the United States. Cases cited concern civil liability of school board members, search of students and seizure of their property, corporal punishment, due process procedures for student suspensions, parental and marital status of students, and termination of teachers. The lengthy section on teacher termination deals with termination for incompetency, immorality and moral turpitude, and cruelty, and also discusses teachers' constitutional rights in termination procedures. (JM)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED193741

Produced and Distributed By
Oklahoma State School Boards Association
4400 North Lincoln Blvd. — Suite 42
Oklahoma City, Oklahoma 73105

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
J. Craddock
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

CRITICAL ISSUES IN SCHOOL LAW

by
Larry Lewis

EA 012 495

1979

INTRODUCTION

Various literature concerning school law has informed its readers of what statutes apply to the subject matter. For instance, books have stated the procedures involved in the termination of teachers and the reasons for which a teacher can be non-renewed or dismissed. The difficulty for the school official facing an actual problem situation is knowing how the law applies to the facts present in his district. For example, a teacher can be terminated for "incompetency." But just knowing that fact provides little practical guidance. What is important is whether the statutory ground encompasses the actions of a teacher who is facing potential non-renewal. The statute does not define the term "incompetency" or any of the other statutory grounds for removal. This book hopes to provide the reader with court decisions which have tried to determine if the facts before them have amounted to statutory grounds for termination such as "incompetency."

Most state courts have determined a school official can search a student if the administrator has "reasonable suspicion" that the pupil is carrying drugs or a weapon or other contraband. But what is a "reasonable suspicion" can only be gleaned from the evidence which courts have had before them in actual litigation. Hopefully, school officials will be able to compare their situation with the court decisions reported in the book and thus more accurately surmise what the law requires of them. At the very least, the cases provide benchmarks for administrative decisions in the search and seizure of students.

The Oklahoma State School Boards Association, in its goal of providing educational and legal information for school officials, is sponsoring this publication, both materially and promotionally. Their interest in the project is greatly appreciated. This volume will be the first in a series of publications the OSSBA will offer concerning vital issues in the field of school law.

THE AUTHOR

Larry Lewis is a practicing attorney in the firm of Howell, Webber and Sharpe in Midwest City, Oklahoma. He is a graduate of Oklahoma State University (1970) and the Georgetown University Law Center (1973). He has served as co-counsel for the Oklahoma State School Boards Association since 1975.

3

MAR 7 1980

TABLE OF CONTENTS

Chapter 1
CIVIL LIABILITY OF SCHOOL BOARD MEMBERS 1

Chapter 2
SEARCH AND SEIZURE OF STUDENTS 11
The "Reasonable Suspension" Test 12
The "Probable Cause" Test 14
School Administrator Is Not A Government Official 15
Search Conducted By A Policeman In the School 15
Locker Searches 16

Chapter 3
CORPORAL PUNISHMENT 19

Chapter 4
STUDENT SUSPENSIONS: DUE PROCESS PROCEDURES 25
A. Suspensions And "Due Process" 26
B. Notice 26
C. Who Can Preside At The Suspension Hearing? 28
D. Hearsay As Evidence 29
E. Right To Counsel 30
F. The Role Of The School Attorney 30
G. Record Of The Hearing 31
H. Unanimous Decision 31
I. Time Of The Hearing 31
J. Miranda Warnings 31
K. Student Violation Of Criminal Laws:
The Privilege Against Self Incrimination 32
L. Double Jeopardy 32
M. The Burden Of Proof 33
N. The Student's Right To Cross Examination 34
O. Anonymity Of Students 35
P. Waiver Of Hearing 35
Q. Rules Which Violate Due Process 35

Chapter 5
SCHOOL REGULATIONS BASED UPON THE PARENTAL OR MARITAL STATUS OF STUDENTS 39

Chapter 6
THE TERMINATION OF TEACHERS 43
Introduction 43
The Oklahoma Law 45
Statutory Grounds For Removal Of A Teacher 50
A. Incompetency and Wilful Neglect of Duty 50
1. Absence Without Permission 52
2. Corporal Punishment 54
3. General Incompetency Charges 54
4. Profanity 56
5. Severity Of Punishment 56
6. Conduct Outside Of School 56

B. Immorality and Moral Turpitude 57
1. Homosexuality 57
2. Sexual Relations With Students 60
3. Sexual Relations With Other Adults 60
4. Commission Of A Crime 61
5. Single Parent Of Illegitimate Child 62
6. Profanity 63
7. Publications and Speech 64

C. Cruelty 65

D. Statutory Grounds Other Than Those Listed In The Teacher Removal Statute 66

E. Special Oklahoma Termination Problems 67
1. Notice by Mail 67
2. Open Meetings 68
3. Resignations 68

F. Federal Court Action: Violation Of Constitutional Rights In Teacher Terminations 69
1. Court Procedures 69
2. The Teacher's Right Of Free Speech 70
3. Academic Freedom 72
4. Privacy Rights 73
5. Marriage 73

CHAPTER 1

CIVIL LIABILITY OF SCHOOL BOARD MEMBERS

The issue of personal monetary liability of school board members is a developing area of the law because the liability standard was not established until 1975 when the famous case of *Wood v. Strickland*[1] was decided by the United States Supreme Court. *Wood* concerned Mena, Arkansas high school students who were expelled for spiking the punch at a school function. The students, alleging their constitutional rights had been violated by the expulsion process, sued the individual school board members.

The case reached the Supreme Court on appeal and the high court held school board members have a "qualified good-faith immunity" for actions they take in their official capacity. However, board members should not be granted "absolute immunity." The criteria to be used by the Courts in determining if a board member is personally liable for his actions includes both a "subjective" and an "objective" test of good faith. If the board member violates either test he can be held personally liable to the plaintiff. In this regard the Court noted:

> The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance of disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

The key holding of the decision stated:

> . . . we hold that a school board member is not immune from liability for damages . . . if he knew or reasonably should have known that the actions he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to a student. That is not to say school board members are 'charged with predicting the future course of constitutional law' . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Thus, *Wood* has made several issues important in determining if a school board member must pay damages to a victorious plaintiff:

1. Did the board member act maliciously? or

2. Did he know or reasonably should have known that his actions would violate . . .

3. The "clearly established constitutional rights" of another?

Although *Wood* dealt with student discipline, the holding has been expanded to include all issues involving schools, such as employment relations.

Several cases have been decided since the *Wood* decision. In some decisions, the court did not find board member monetary liability because the interest the plaintiff alleged the board had infringed upon was not a "constitutional right" pursuant to the *Wood* standard. For instance, a student was excluded from the school soccer team for not complying with the board's hair length regulations. The majority of the Court held that the issue of student hair length was not a "constitutional" question and thus under *Wood* there could be no personal liability assessed against the board members, even though a board did not have the power to impose hair regulations.[2]

Other decisions have also refused to grant damages against individual board members because even though the actions of the board might be held to be unreasonable and therefore void, no "clearly established constitutional rights" had been violated. A school board regulation mandated that each student complete one year of ROTC before graduation. A student was expelled because he refused to participate in the program for religious reasons. The Court dismissed the student's claim for damages. The "subjective" test was not violated because the defendants had not acted with malicious intent. The "objective test" of *Wood* was also passed because the freedom to choose not to attend ROTC classes was not a "clearly established constitutional right." Although when the board required the student to complete the course another court case had been decided which held a board could not constitutionally require a student objecting on religious grounds to complete a course in military instruction as a condition of graduation, the Court found that previous decision by its dissent "illustrates . . . the lack of constitutional certitude in this area. Absent such certitude, *Wood* dictates that damages may not be imposed on school board members. In the absence of authoritative decisions from the Supreme Court, from this court, or even from other circuits, we hold as a matter of law that the Board did not violate Sapp's 'clearly established constitutional rights.' "[3]

A teacher dismissed because she lived with a man to whom she was not married alleged her discharge violated her "constitutional right to privacy." The Court denied her claim:

> While the right of a couple to live together without benefit of matrimony eventually may be held to fall within the penumbra of the constitutional right to privacy, it had not been so held at the time the Board dismissed the appellant. Thus, it cannot be said that the members of the School Board either knew or reasonably should have known that their actions

would violate a "constitutional right" of Ms. Sullivan. Further, even if the Constitution does afford Ms. Sullivan's lifestyle some protection, *Pickering v. United States* . . . holds that the Board must balance the interests of the teacher against its own legitimate governmental interests.[4]

Pickering[5] stated that although a student or teacher has free speech rights in the school those rights must be balanced against the State's right to promote an orderly school system. The Court, by referring to *Pickering*, was therefore stating that sometimes there are justifications for infringing upon the constitutional rights of another and that such a defense to personal damages would be available to school board members.

In another decision the Court held the plaintiff teacher union had not been denied First Amendment free speech rights by the Board when the Board granted exclusive bargaining privileges to another teachers' union. The right to bargain with the Board by the minority union was not a "constitutional right."[6]

Free speech is the most common constitutional right alleged to have been violated by board members. A discharged assistant professor sued the trustees and president of the university for allegedly terminating him in retaliation for his exercise of free speech. The Court stated that the judiciary system should not be used to correct errors committed by school administrators which did not arise to the level of the "violation of specific constitutional guarantees." In the factual situation before the Court the teacher's only proof touching upon his First Amendment claim was that he had spoken out in some faculty meetings and associated with some faculty members who disagreed with their superiors. "It is only surmise that his discharge was in retaliation for his statements or associations."[7]

When non-tenured teachers sue a board for their discharge they must allege a violation of some "liberty" right because they have no "property" right to continued employment. Thus, a terminated member of the Board of Regents of the Museum of New Mexico lost his suit against the Governor who fired him. The Court found he had no continued expectation of employment in the governmental position and thus did not have a property right under the Constitution which could be violated.[8] A similar reasoning applies to nontenured teachers.

The United States Supreme Court refused to allow damages against a police chief who distributed a "flyer" to merchants containing the names and photos of persons either arrested within the last two years or who were known to be active shoplifters. The plaintiff alleged the flyer defamed his character. The Court held injury to reputation, although a wrong, was not a deprivation of a federally protected property or liberty right.[9]

One decision found that even though a discharged teacher had a constitutional right to a hearing she had waived such a right. The board had received a letter from the teacher's attorney stating that no

hearing on the termination would be requested until other remedies, negotiations, had been pursued. "Assuming Mrs. Martin is correct in her assertion that under university regulations she was entitled to a hearing prior to the suspension of her pay, there was at least some evidence from which the board members could infer that she had waived the hearing. Their action was certainly not a violation of unquestioned constitutional rights."[10]

The plaintiff must prove the violation of a constitutional right by the board members. A non-renewed teacher alleged the board terminated her employment because she was a member of a minority race. The Court, however, did not find sufficient evidence that either the board members or the superintendent were motivated by racial discrimination in terminating her employment.[11]

In another decision a discharged professor alleged the university had deviated from its own regulations in the termination process. The Court concluded:

> While we agree that any governmental organization should follow its own procedures in dismissing a member, we cannot agree that the University's failure to follow its own rules on student discipline in this case constituted, in and of itself a denial of Plaintiff's constitutional rights to due process of law.[12]

An expelled student argued that a statute allowing the board to expel him was unconstitutionally vague. The Court agreed with the student. The Court, however, did not allow damages against the board members because "governmental immunity is a defense here where the board had to weigh the evidence and reach conclusions, determine issues of fact and credibility of witnesses."[13]

Even if a "constitutional right" has been violated, the Court will deny damages when the right was not "settled law" as required by *Wood*. In one instance, a teacher sued the board for failure to grant her sick leave during a normal pregnancy. The Court held the board policy violated the Civil Rights Act. But no damages against the board members were allowed because "the school board members did not disregard 'settled, indisputable law' since the courts themselves have been split as to whether or not pregnancy may permissably be excluded from sick leave coverage."[14]

This view also fits in with the *Wood* reasoning that board members do not have to forecast future legal trends in constitutional law. Often, the Supreme Court will declare a constitutionl right exists and those who have been denied that right seek court relief. The Supreme Court in 1974 ruled that a school board could not require pregnant teachers to leave their employment at a set time during pregnancy. A teacher, who had been required to leave employment at the end of her fifth month in 1971, sued the board. The Court found when the Board

had made its policy there was "no adjudication binding on the board that its existing pregnancy policy was unconstitutional, let alone unquestionably so." In fact, when the board had implemented the termination, a federal district court had upheld a similar pregnancy policy in another district.[15]

Teachers with tenure have a constitutional due process right to a statement of the charges for removal and a hearing to contest the charges. Such rights were declared by the Supreme Court in 1972. Teachers discharged without a hearing before that date have not been allowed damages by several courts since the decision had not yet been made conferring such rights. Thus, the defendants did not know nor could they have reasonably known they were violating settled constitutional rights.[16]

In one decision the Court found that even though the Board had acted after the Supreme Court decided *Roth,* which granted hearing rights to tenured teachers, the board members could not have known that informing the plaintiff of her right to a hearing did not entitle them to safely assume that an absence of a request by her for a hearing relieved them of the duty to give her one.[17]

Some cases have found board members personally liable because constitutional rights which were settled law were violated. For example, the President of Florida Atlantic University passed the subjective test of *Wood* but failed the objective test when he dismissed the editors of the student newspaper. Because he felt the editorials were an embarrassment to the University, the President had administrative personnel assume control of the paper. Subjectively, he felt his actions would serve the best interests of the school. But objectively he violated known constitutional rights of the First Amendment. In 1969, the United States Supreme Court held First Amendment rights applied to students. Although the State must have power to operate an orderly educational system, free speech rights cannot be abridged by school authorities unless there were facts present which might reasonably lead school officials to forecast a "substantial disruption of or a material interference with school activities" or such disruption must have already occurred. None of these factors were present in the University case. The Court decided the President was liable because "the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances."[18] Fortunately for the President, only $1.00 in damages was assessed against him.

One Court found sex discrimination to be a known constitutional freedom. Relying on *Wood,* the Court found it was a "settled, indisputable principle that federal government sex discriminations not supported by rational (or perhaps compelling) legitimate justifications are unconstitutional." Thus, the plaintiff could sue her ex-employer, a Congressman, for personal damages as to her dismissal.[19]

Another case held a known constitutional right was violated when a teacher was discharged for wearing a beard which was prohibited by a faculty regulation.[20]

A professor wrote an editorial in the student newspaper accusing the chairman of the Board of Trustees of conflict of interest in certain contracts awarded by the college. He was terminated and sued the Trustees and the President. The Court easily determined that *Wood* allowed damages in this instance because "it is not open to question, nor was it at the time of these events, that activities connected with the publication of a student newspaper are within the protection of that provision of the United States Constitution." Also, in favor of the plaintiff was the fact that the defendants' own expert acknowledged that a faculty advisor who wrote an editorial for a student newspaper would be entitled to First Amendment protection; that there was no proof the editorial might lead to "material or substantial disruption of classwork;" nor was there any countervailing public interest which would justify a restriction of the plaintiff's First Amendment activities. "The point to be stressed is that careless disregard or negligent ignorance of clear, well-established constitutional rights will not insulate these defendants from liability."[21]

Does reliance upon a legal advisor or authority provide a defense for board members? Some courts have discussed such an issue. A former mental patient sued for unlawful confinement. The sheriff-defendants were held to be immune from damages because they "acted at all times in good faith reliance on Arkansas law, without reason to believe that the appellant had been committed without notice and hearing."[22]

Resident aliens sued the President of Mississippi State University and other school personnel for requiring aliens, pursuant to state law, to pay nonresident tuition. Although the Court found the statute to be unconstitutional "we hold that the defendant University officials are not personally liable for the excess tuition payments . . . . There is nothing in the record to indicate that the defendants acted unreasonably or in a matter outside of their official capacity. Defendants were merely complying with the clear state mandate in collecting out-of-state tuition from these resident aliens. Defendants were not on notice of the statute's unconstitutionality prior to payment and acceptance of money. They were acting in complete good faith.[23]

However, one decision held reliance on a statute was not a defense to personal liability in some circumstances. Creditors, pursuant to a state statute allowing the seizure of a debtor's property prior to a judgment and without a hearing, had the sheriff seize the debtor's mobile home, in which his family lived. The Court stated:

> Although recognized official has no duty to anticipate unforseeable constitutional developments "we nevertheless recognize that there may be circumstances, such as exist here, where bad faith may be found . . . even though a defendant acts pursant to a presumptively valid statute. A person may feel he is pursuing his legal rights but, where his acts are oppressive and in reckless disregard of another person's constitutional rights, he can still be liable . . . for his misconduct."

The Court concluded:

> Notwithstanding the defendant's good faith belief that the state law allowed them to exercise their proprietary right by seeking summary attachment, the jury had a right to find the defendants acted in reckless disregard of the plaintiff's security and welfare in derogation of their basic constitutional rights, absent notice of a fair hearing, to be secure in their home.

The Court added that one did not have to be a constitutional lawyer for a creditor to know the effects of taking away a debtor's mobile home as a result of a proceeding without a hearing which evicted them from their home without a chance to object.[24]

Reliance on an attorney has been commented on by some courts. One found the defendants had acted in good faith because they specifically asked the State Director of Legal Services for a ruling on the issue and acted in reliance thereon.[25] Another case remarked that "each defendant testified the board sought and received legal advice of the City Solicitor's Office regarding the question of notice and the question of termination of the hearings. The board members, even if wrong, cannot be held to have acted negligently regarding the plaintiff's rights."[26]

One decision found reliance upon a superintendent's recommendation for termination to be a defense for the board. The members "acted in reliance on the integrity of Mr. Hupp which they had no previous reason to doubt." In a discharge for insubordination, the superintendent told the board the teacher would not follow directives he had given her.[27]

However, another court rejected the idea of reliance as proving good faith, at least in the circumstances before the Court:

> To satisfy the test (*Wood*), it is not enough that McCormick sought the advice of counsel. He must establish that his actions did not violate a clearly established constitutional right. Such a constitutional right can be so clearly established that it is unreasonable for a defendant to rely upon contrary advice from legal counsel.[28]

In summary, a board member can escape personal liability if:

1. The plaintiff fails to prove the violation of a constitutional rights;
2. The plaintiff proves the violation of a right but not such a right as is guaranteed by the Constitution;
3. The plaintiff proves the violation of a constitutional right but the board proves the State's interest in curbing such a right outbalances the exercise of the right;
4. The plaintiff proves a violation of a constitutional right but such right was not such a "clearly established constitutional right" that the board should have known of its existence; and,
5. In all of the above instances the board member did not act maliciously.

Ignorance of the law is not an excuse for a school board member. "A mere denial of knowledge is not sufficient under *Wood* . . ."[29]

Once the plaintiff shows a "prima facie" right to damages the board member defendant has the burden of proving to the Court that he is immune because the right was not a constitutional right, was outbalanced by the State's interest, was not violated or if violated, was not clearly established. The qualified immunity of a board member is an affirmative defense, which must be plead and proved by the board member after plaintiff makes sufficient proof of a claim against the member.[30]

When the plaintiff does prove the subjective or objective test has been violated by a board member or administrator, what is the standard for determining the amount of damages? What is a constitutional right worth so that one can determine what the damages should be for its deprivation? There is no firm guideline to use. One Court did attempt to answer the question. The Court held that damages could be awarded even though the plaintiff did not have any out-of-pocket expenses resulting from the deprivation of a federal right. Quoting from another case, the Court acknowledged that although there was no objective standard for such damages, factors to be included in reaching an amount were the nature of the constitutional deprivation and the magnitude of the mental distress and humiliation inflicted upon the plaintiff. In the case before the Court, punitive damages were removed against the trustee members but were allowed against the University President because he had acted with malice. Compensatory damages against the individual trustee members and the President were reduced from the $10,000 figure determined by the jury to $2,500.[31]

In another decision, punitive damages of $5,000 and an attorney fee award of $5,800 were reversed because although the jury decided the defendants had acted in bad faith they also found they had not acted with malice. However, a compensatory damage judgment of $33,000 was upheld. Although the board contended the reasons for the non-renewal of a non-tenured teacher included lack of discipline over students, lack of tidiness in the classroom and inadequate teaching methods, the jury agreed with the plaintiff that these were not the real reasons for her removal. In answer to special interrogatories attached to the verdict, the jury determined the reasons for non-renewal were:

1) Her physical size;
2) Her lack of church attendance;
3) The location of her trailer; and,
4) The conduct of her personal life.

The court concluded there was a constitutional violation present for terminating her contract upon such grounds because of infringement upon her privacy rights. The court stated:

> The right to be free from unwarranted government intrusions into one's privacy is a fundamental constitutional right, *Stanley v. Georgia*, 394 U.S. 557 (1969), and such right of privacy embraces the right of an individual to attend church or not, to determine his or her own physical proportions and to determine with whom he or she will associate.[32]

This decision, therefore, extended the teacher's constitutional rights of privacy to a greater degree than have previous court decisions.

FOOTNOTES

1. 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).
2. *Zeller v. Donegal School District Board of Education*, 517 F.2d 600 (3rd Cir., 1975).
3. *Sapp v. Renfroe*, 511 F.2d 172 (5th Cir., 1975).
4. *Sullivan v. Meade Independent School District No. 101*, 530 F.2d 799 (8th Cir., 1976).
5. *Pickering v. Board of Education of Township High School District No. 205*, 391 U.S. 563 (1968).
6. *Memphis American Federation of Teachers, Local 2032 v. Board of Education of Memphis City Schools*, 534 F.2d 699 (6th Cir., 1976).
7. *Prebble v. Broadrick*, 535 F.2d 605 (10th Cir., 1976).
8. *Mitchell v. King*, 537 F.2d 385 (10th Cir., 1976).
9. *Paul v. Davis*, 424 U.S. 693 (1976).
10. *Martin v. University of Louisville*, 541 F.2d 1171 (6th Cir., 1976).
11. *Kelly v. West Baton Rouge Parish School Board*, 517 F.2d 194 (5th Cir., 1975).
12. *Edwards v. Board of Regents of Northwest Missouri State University*, 397 F. Supp. 822 (W.D. Mo. 1975).
13. *Mitchell et al., v. King et al.*, 369 A.2d 68 (Conn., 1975).
14. *Hutchinson v. Lake Oswego School District No. 7*, 519 F.2d 961 (9th Cir., 1975).
15. *Shirley v. Chagrin Falls Exempted Village Schools Board of Education*, 521 F.2d 1329 (6th Cir., 1975).
16. *Bertot v. School District No. 1*, 522 F.2d 1171 (10th Cir., 1975); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir., 1975); *Mims v. Board of Education of City of Chicago*, 523 F.2d 711 (7th Cir. 1975); *Decker v. North Idaho College*, 552 F.2d 872 (9th Cir., 1977).
17. *Brown v. Bathe*, 416 F.Supp. 1194 (N.D. Neb. 1976).
18. *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975).
19. *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977).
20. *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975).
21. *Endress v. Brookdale Community College*, 364 A.2d 1080 (N.J. 1976).
22. *Sebastian v. United States*, 531 F.2d 900 (8th Cir. 1976).
23. *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976).
24. *Guzman v. Western State Bank of Devils Lake*, 540 F.2d 948 (8th Cir. 1976).
25. *Hutchinson, supra*, note 14.
26. *Patterson v. Ramsey*, 413 F.Supp. 523 (Md. 1976).
27. *Morris v. Board of Education of the Laurel School District*, 401 F.Supp. 128 (Del. 1975).
28. *MacMurray v. Board of Trustees of Bloomsburg State College*, 428 F.Supp. 1171 (M.D. Pa. 1977).
29. *Kellerman v. Askew*, 541 F.2d 1089 (5th Cir. 1976).
30. *Endruss, supra*, note 21.
31. *Ibid.*
32. *Stoddard v. School District No. 1, Lincoln County, et al.*, 429 F.Supp. 890 (Wy. 1977).

CHAPTER 2

SEARCH AND SEIZURE OF STUDENTS

A current area of legal difficulty for school administrators concerns the problems arising in respect to student arrest, police interrogation of students, the search and seizure of contraband from students by school officials and by police on school property, and the presence of the police in schools.

Although Oklahoma courts have not ruled on these subjects, guidelines can be ascertained from the court decisions of other states. Schools are not havens for the criminal element, and just because a law violator is a juvenile does not prevent the police from entering schools in the performance of their official duties. In fact, schools in crime plagued east coast regions have had to assign police to schools and/or station security men within the school building. In dealing with the police, the school official owes a duty to the protection of the students in his charge as well as a duty to cooperate with law enforcement officials. As an example of the problems which might occur, the legal counsel for the New York Education Department issued the following instructions to school administrators in regard to their relationship to the police:

> The school particularly does not have custody of the pupils for the purpose of authorizing law enforcement officers or other third parties to interrogate pupils or to remove them from the premises for any purpose whatsoever. The rights of the parent in all such matters are paramount and may not be assumed by the school. The school, however, is given instructions to cooperate with law enforcement officers, to honor warrants for arrest and court orders for production, and is told of the need to make students available where a crime has been committed on school grounds.

Court decisions have naturally assumed the police have a right to enter school buildings and have not questioned their authority to do so. But many recent cases have dealt with the Fourth Amendment's protection of citizens from unreasonable searches and seizures conducted by governmental officials. For a policeman or other law enforcement official a reasonable search and seizure necessitates "probable cause" that the item sought is where the policeman thinks it is and also requires the issuance of a warrant, except in unusual circumstances, by a magistrate. Because of the widespread use of drugs in

public schools and because of concentrated effort by both the police and school officials to eliminate student drug abuse, recent court decisions have had to tackle the search and seizure problem as it relates to the special school environment. Basically, the courts have held four different positions:

1. A search of a student by a school official is a search by a government official and therefore the search is subject to the requirements of the Fourth Amendment. However, a search does not have to meet the "probable cause" standard required of policemen. A search, instead, is constitutionally reasonable if the school official has "reasonable suspicion" that the student is concealing contraband. This lesser standard than "probable cause" is approved because of the special relationship between students and the school administration. The "reasonable suspicion" test is also known as the *Jackson* rationale;

2. A search by a school official is by a government employee and subject just as much to the Fourth Amendment as is a search by a policeman. Therefore, school administrators must refrain from searching students if they do not possess the "probable cause" as to the whereabouts of concealed contraband that is required of policemen when they perform their duties;

3. A search by a school official is not a search by a government official and is thus not subject to the Fourth Amendment controls over searches by government personnel;

4. A search of a student in a school by a policeman must be in conformance with the Fourth Amendment "probable cause" requirements.

THE "REASONABLE SUSPICION" TEST

A high school discipline coordinator received information concerning a student's connection with drugs. As the coordinator was leading the student to his office to question him about drug activities he noticed a bulge in the pupil's coat pocket. When he asked the boy what the object was the student bolted from his grasp and ran from the school grounds with the school official in hot pursuit. A policeman near the school office assisted in the chase and the two men captured the boy three blocks away from the school, where the coordinator found drug paraphernalia in the jacket. The student moved to suppress the drug evidence in the trial against him on the grounds that the search was illegal because probable cause was not present. The court ruled that a school official stands *in loco parentis* (in the place of the parent) to the student in his care and has an obligation to protect the children of the school from dangerous influences. Thus, for the proper maintenance of school discipline, the probable cause constitutionally required for the search and seizure conducted by a government law enforcement official should not be imposed on those standing in place of parents. Although the court recognized a student does have constitutional rights in school, a search of a student by a school official is valid if the official has "reasonable suspicion" that narcotics may be found on the student. *People v. Jackson*, 319 N.Y.S. 2d 731 (1971).

A look at recent cases reveals what factors courts have considered to have constituted "reasonable suspicion" of student possession of drugs:

a) A student out of his classroom without the teacher's permission was brought to the vice principal's office for discipline. This administrator knew that the student had previously experimented with drugs and a tug of war developed when the school official sought to take the student's jacket. The school official won the contest and discovered hashish in the coat pocket. At his trial, the student sought to suppress the hashish as evidence because the vice principal did not have probable cause to search his jacket. The court held that the administrator was a government official, to which the constitutional protection against unreasonable searches and seizures applied, rather than a private individual, over which the Fourth Amendment has no authority. But the doctrine of *in loco parentis* was regarded as being so important that school operations had to be balanced against the constitutional rights of the students. The court adopted the "reasonable suspicion" test and concluded that because the student was not in class, had a known drug activity and had something contained in his pocket the administrator had reasonable suspicion to believe the jacket contained drugs.[1]

b) A principal received a telephone call from an unidentified source who asserted that a student was selling pills in the school restroom that morning. The next day a student told his teacher the defendant was trying to sell white pills to other pupils. The teacher informed the principal of this, who in turn called the student to his office. The defendant agreed to a search, which was conducted by a female nurse in the private office. A policeman was then called, who thought the pills were amphetamines and placed the girl under arrest. The court held the privacy rights of the student must give way to the overriding governmental interest in allowing searches based on reasonable suspicion. The judge stated the school administrator had a duty to investigate drug information and that in this instance there was no evidence the official had acted "on a mere whim or capriciously." Instead, he had responded to reasonable suspicions of drug possession.[2]

c) The defendant was observed by a teacher as the boy twice went into a school restroom with another student, both of whom reappeared within 10 seconds. Defendant had been under a six month observation for possible drug dealing. The principal called the student to his office and a search revealed heroin. Although recognizing the wider latitude allowed for searches for school personnel, the court found there was no "reasonable suspicion" of drug possession from the fact defendant entered the restroom for brief stays and associated with known addicts in the cafeteria. Such actions were viewed as innocent conduct, although the court stated concentrated association with students suspected of drug abuse would provide the reasonable suspicion needed for a search.[3]

d) A teacher saw a 13 year old smoking a pipe as the student was walking between classes. The court listed factors which it felt should

be determined in considering the sufficient cause needed for a search:

1. The student's age;
2. The child's history and record in the school;
3. The prevalence and seriousness of the problem in the school in which the search was made;
4. The exigency to make the search without delay; and,
5. The reliability of information used as justification for the search.

The court held that here the student was seen smoking by a teacher on school property. Such information granted reasonable cause to believe a search was needed.[4]

e) A teacher told a counselor he had seen the defendant selling and passing pills in school on several occasions. The counselor told the principal about this the next day. The morning after that the principal called the defendant into his office and told him if he did not empty his pockets he would conduct a search. The student's clothing contained pills. The police department was then called. The court held the principal had acted with "reasonable suspicion."[5]

f) A teacher and dean observed the defendant smoking on school grounds during school hours. The school officials smelled marijuana as they approached the students. The boys were escorted to the dean's office and marijuana was found. The judge decided "reasonable suspicion" was the proper test and the test was met.[6]

g) An assistant principal was approached by a student who stated he had seen the plaintiff and other pupils passing back and forth what the student thought were drugs. The activity had occurred in a study hall class that morning. Also, the plaintiff appeared to have had a large amount of money in his possession. The next morning the administrator went to the study hall, took the boys to the kitchen and searched them after the plaintiff had refused to empty his pockets. The administrator called the plaintiff's parents and asked them to come to the school for a conference about the matter. He also wrote a letter to the parents notifying them the student had been suspended for 10 days. The court held the lack of school policy guidelines for school administrators to follow in student searches did not deny the pupil due process. This was a school official acting alone and thus he only needed a "reasonable cause to believe" that drugs were possessed. In this instance, reasonable cause was present.[7]

THE "PROBABLE CAUSE" TEST

A high school senior in a physical education class put his wallet and valuables in a bag, which were then placed in a large duffel bag and locked in the gym instructor's office. The defendant had trouble fitting his wallet into the bag, and as the instructor watched his efforts he remembered that the pupil had consorted with drug users. The instructor searched the wallet and found marijuana. The Louisiana Supreme Court refused to adopt the "reasonable suspicion" test but instead held school officials were subject to the same probable cause

requirements as policemen were. A dissent upheld the reasonable suspicion doctrine.[8]

SCHOOL ADMINISTRATOR IS NOT A GOVERNMENT OFFICIAL

A student told the vice principal that a classmate was selling drugs in the school. The administrator called the suspect to his office and asked him to empty his pockets. He saw the boy try to hide something in his shoe, which turned out to be drug capsules. The police were then called. The Pennsylvania court ruled the search would have been unreasonable if conduct by a policeman, but the administrator was not a government official and thus he was free from the restrictions of the Fourth Amendment.[9]

SEARCH CONDUCTED BY A POLICEMAN IN THE SCHOOL

A uniformed high school security guard employed by the board of education received information that a student wearing a corduroy coat had stolen a watch from another student. In the school corridor this guard stopped the defendant, who was wearing a coat fitting the description, and escorted him to the dean's office to question him about the watch he was wearing. When the dean noticed a brown envelope protruding from the defendant's pocket he asked the boy to reveal everything in it. Marijuana was found in the envelope and the security guard called in a policeman attached to the school, who arrested the student for drug possession. The court, in ruling on the admissibility of the marijuana into evidence, determined that since a security guard with duties of crime control and school safety, instead of a school administrator, had detained the student, the doctrine of *in loco parentis* did not apply. The guard was therefore subject to the same probable cause requirements that policemen must satisfy. Since he had only seen an envelope protruding from the pocket, unlike a weapon or open drugs, there was no probable cause for the seizure and the arrest. Although the court approved the "reasonable suspicion" test for school officials, the security guard did not fit into that employment category.[10]

A policeman assigned to duty at a school was called to the cafeteria where boys were shouting at the vice principal, who had broken up a card game. The vice principal suspended the defendant and told the policeman to arrest the student if he failed to leave the school. Shortly thereafter, the policeman saw defendant on the school steps putting money into an envelope as an ex-student known to be an addict approached him. Both boys turned away as the officer appeared and the defendant started to run after he declared there was nothing in the envelope. The officer grabbed the envelope, which contained heroin, and defendant escaped until he was arrested on a warrant. At trial, the policeman stated he did not see anything pass between the two boys, but he thought the defendant was going to sell narcotics. The court

held the policeman was subject to the probable cause rather than reasonable suspicion standard and reluctantly held that probable cause for the seizure was lacking.[11]

A principal received a phone call leading him to suspect that the 13 year old plaintiff and two other students possessed illegal drugs. The superintendent told the principal to call the police, which he did. The police arrived and the girls were then searched by the school nurse and school psychiatrist. No drugs were found. The students then sued. The court pointed out that even in jurisdictions which held the school official was not a government official that police involvement prior to the search changed the result in every reported case. When the police had significant participation in the search, then Fourth Amendment rights could not be abridged by a standard less than probable cause. Although a school official conducting a search could justify his conduct if it were reasonable in terms of the school's *in loco parentis* authority, "no case can be found contradicting the notion that when a government official works with the police to conduct a search which is, at least in part, in the nature of a criminal investigation, and which occasions such an invasion of privacy as in the present case, that search is subject to the reasonable of the Fourth Amendment."[12]

LOCKER SEARCHES

A policeman visited a principal of a Kansas school to inform the administrator of the possible connection between one of his students and an off-school burglary. The principal, at the request of the policeman and with the permission of the defendant, opened the student's locker to search for stolen property. Although no stolen goods were discovered, a key was found. The police found that this key opened a locker at the Lawrence bus station. Property taken during the burglary was found in that locker. The court ruled there is a difference between the search of a student's personal clothing and the search of a locker, which is school property. The judge held that a student's possession of a school locker is not exclusive to school officials. School administrators, the court decided, have an inherent authority to inspect school lockers at the request of a policeman.[13]

In a similar situation, three police department detectives went to a high school with a search warrant, which was later determined to be constitutionally defective. Two students were searched but no contraband was discovered. The vice principal consented to a search of the students' lockers. That search found four marijuana cigarettes. The judge held the administrator had authority to give consent for the students for the search. The court recognized the special relationship between school officials and the students in their charge and also held that students were not entitled to exclusive possession of their lockers. The court reasoned that school administrators could not properly supervise students if they could not maintain control over lockers. Thus, a police search based on the consent of the vice principal alone was a reasonable search meeting constitutional guarantees.[14]

CONCLUSION

In adopting the reasonable suspicion test, the Supreme Court of Washington recognized the need to give school officials more leniency in the search and seizure field than is granted to policemen:

> The high school principal is not a law enforcement officer. His job does not concern the discovery and prevention of crime. His duty as the chief administrator of the high school includes a primary duty of maintaining order and discipline in the school. In carrying out this duty, he should not be held to the same probable cause as law enforcement officers. Maintaining discipline in schools oftentimes requires immediate action and cannot await the procurement of a search warrant based on probable cause.[15]

70 O.S. 24-102 states that the superintendent or principal has authority to search for dangerous weapons and drugs. Also, the superintendent or principal shall notify the local law enforcement authorities so that proper search warrants can be obtained. The statute, however, does not state what conduct would entitle a school official to conduct a search in regard to constitutional protections. The trend among the decisions indicates that most courts are allowing school administrators wide latitude in running the schools while at the same time striving to preserve the constitutional rights of students.

FOOTNOTES

1. *State v. Baccino*, 282 A.2d 871 (Del. 1971).
2. *In Re State In Interest of G. C.*, 296 A.2d 102 (N.J. 1972).
3. *People v. D*, 358 N.Y.S.2d 403 (1974).
4. *Doe v. State*, 540 P.2d 827 (N. Mex. 1975).
5. *People v. Ward*, 233 N.W.2d 180 (Mich. 1975).
6. *Nelson v. State*, 319 So.2d 154 (App. Fla. 1975).
7. *M v. Board of Education Ball-Chatham Community Unit School District No. 5*, 429 F.Supp. 288 (S.D. Ill. 1977).
8. *State v. Mora*, 307 So.2d 317 (La. 1975).
9. *Commonwealth v. Dingfelt*, 323 A.2d 145 (Pa. 1974).
10. *People v. Bowers*, 339 N.Y.S.2d 783 (1973).
11. *Waters v. United States*, 311 A.2d 835 (D.C. 1973).
12. *Picha v. Wielgos*, 410 F.Supp. 1214 (N.D. Ill. 1976).
13. *State v. Stein*, 456 P.2d 1 (Kan. 1969).
14. *People v. Overton*, 229 N.E.2d 596 (N.Y. 1967).
15. *State of Washington v. McKinnon*, 558 P.2d 781 (Wash. 1977).

CHAPTER 3

CORPORAL PUNISHMENT

The United States Supreme Court recently clarified the position of corporal punishment in schools. In 1975 a federal district court held that parents did not have the right to prevent school officials from paddling their children. However, the court also established procedural guidelines that had to be followed during the administration of such discipline. For example, paddling could not be used unless the student had been told in advance that specific misbehavior would be punished by paddling; paddling could never be used as the first line of punishment; the paddling had to be conducted before another teacher who must have been given the reason for the discipline in front of the student, and, the school employee administering the paddling had, upon request, to give the parents a written explanation of the reasons for the punishment and the name of the other school official present during the discipline. On appeal to the United States Supreme Court the decision was affirmed without a written opinion.[1] What was the Supreme Court affirming — the fact that parents did not have the right to prohibit school officials from paddling their children or, in addition, the procedural safeguards that had to be employed when paddling was implemented?

In 1977 the Supreme Court cleared confusion in this area.[2] Because "he was slow to respond to his teacher's instructions" a junior high student was subjected to more than 20 licks with a paddle while he was held over a table in the office of the principal. The discipline was so severe that the student suffered a hemotoma which required medical attention and forced the pupil to miss 11 days of school. Another student was paddled several times for "minor infractions." He was struck on the arms twice, once "depriving him of the full use of his arm for a week." The students sued their principal, assistant principal, assistant to the principal and superintendent. They alleged the paddling violated their constitutional right to be free from cruel and unusual punishment under the Eighth Amendment of the Constitution.

At the time of the incident, Florida had a statute which disallowed corporal punishment which was "degrading or unduly severe" or which had not been discussed beforehand with the principal. The Dade County School Board Policy allowed corporal punishment "where the failure of other means seeking cooperation from the student made its use necessary. The regulation specified that the principal should determine the necessity for corporal punishment, that the student should

understand the seriousness of the offense and the reason for the punishment, and that the punishment should be administered in the presence of another adult . . . ."

The Supreme Court had first to determine if the paddling of students as a means of maintaining school discipline constitutes cruel and unusual punishment in violation of the Eighth Amendment. And, second, if paddling is permitted by the Constitution, does due process require prior notice and an opportunity to be heard before the discpline could be administered?

In regard to the issue of whether paddling violated the Eighth Amendment, the Court noted that the scope of the Amendment's prohibition could be found in "traditional common law concepts." The Court found "at common law a single principle has governed the use of corporal punishment since before the American Revolution; teachers may impose reasonable but not excessive force to discipline a child." Punishment that was "reasonably necessary 'for the proper education of the child and for the maintenance of group discipline' . . . ." was sanctioned. Whether punishment was reasonable rested on "the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline."

Because historically the Eighth Amendment prohibition against cruel and unusual punishment had only applied to protect those convicted of crimes, the Court held the Amendment "does not apply to the paddling of children as a means of maintaining discipline in public schools."

Now the Court had to determine if due process procedures of the Constitution applied to paddling. The Fourteenth Amendment prohibits "any State deprivation of life, liberty or property without due process of law." The Court found that "corporal punishment in public school implicates a constitutionally protected liberty interest." What due process was then due to the student? The Court concluded that the common law remedies "are fully adequate to afford due process."

The common law required that a child not be subjected to excessive punishment in school. If the punishment is excessive "the school authorities inflicting it may be held liable in damages to the child and, if malice is shown, they may be subject to criminal penalties." Because of possible legal action against school officials who bypass the common law restraints on punishment, due process is served. "Teachers and school authorities," the Court stated, "are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them."

The Court concluded that additional due process guarantees to the common law restraints were not needed:

> In view of the low incidence of abuse, the openness of our schools, and the common law safeguards that already exist, the risk of error that may result in violation of a school-child's substantive rights can only be re-

garded as minimal. Imposing additional administrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility. We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practiced is authorized and limited by the common law.

In summary, the Supreme Court held corporal punishment does not violate the Constitutional provision against the infliction of cruel and unusual punishment and the common law restraint on such punishment, it must be reasonable, stands. In considering what is reasonable punishment, the Court listed several factors:

1. The seriousness of the offense,
2. The attitude and past behavior of the student,
3. The nature and severity of the punishment,
4. The age and strength of the student, and,
5. The availability of less severe but equally effective means of discipline.

Oklahoma has several statutes that relate to the discipline of children. As stated by the Supreme Court, if punishment is unreasonable the teacher may face civil or criminal liability. 70 O.S. 6-114 states:

> The teacher of a child in attending a public school shall have the same right as a parent or guardian to control and discipline such child during the time the child is in attendance or in transit to or from the school or any other school function authorized by the school district or classroom presided over by the teacher.

In the State's criminal code, 21 O.S. Sec. 843 holds:

> Any parent or other person who shall willfully or maliciously beat or injure, torture, maim, or use unreasonable force upon a child under the age of seventeen (17), or who shall cause, procure or permit any of said acts to be done, shall be punished by imprisonment in the state penitentiary not exceeding five years, or by imprisonment in a county jail not exceeding one year, or by a fine of not more than Five Hundred Dollars ($500), or both such fine and imprisonment.

The criminal code does not contain a special section to sanction the use of reasonable corporal punishment in the schools. 21 O.S. Sec. 844 states: "Provided, however, that nothing contained in this Act shall prohibit any parent, teacher or other person using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling."

Oklahoma's statutes therefore recite the common law rule which the Supreme Court held complies with due process for spanking in the schools. The law prohibits "unreasonable force upon a child" and sanctions the use of "ordinary force as a means of discipline" by a teacher.

Some recent decisions have concerned allegations that teachers used excessive force in attempting to discipline students. In one case, a

parent alleged her child's nervous sytem and learning abilities had been damaged and her earning capacity reduced as a result of the teacher abusing, embarrassing and intimidating her child. The plaintiff here sought court relief for alleged excessive non-physical force. The court dismissed the law suit and held a teacher has the right to inflict reasonable corporal punishment; a teacher also has a right to verbally chastise a child; and, a teacher could not be sued for liability unless there was malice and none existed in this case.[3]

In another decision, the teacher was found liable for near shocking behavior in administering corporal punishment. The student alleged the teacher was guilty of assault and battery while the teacher claimed any injuries were incurred in self-defense protection. The student's injuries included a bloody nose and an eye that was swollen shut. Hospitalization was required. Based on these facts, the court ruled the corporal punishment was unreasonable and excessive.[4]

A Texas football coach was sued for civil assault damages to compensate one of his players. The coach inflicted bruises and severe cervical sprain on the pupil by grabbing his football helmet and throwing the athlete on the ground. A jury acquitted the coach and the student, objecting to the instructions read to the jury, appealed. The controverted instructions concerned the legitimate reasons allowing a teacher to administer corporal punishment. The jury had found the coach had not acted with the intent to harm the student and that any physical pain resulted from the coach's attempt at "instruction and encouragement." The coach had testified his actions were "for the purpose of 'firing him up' or 'instilling spirit in him.' "

The appellate court rejected the contention that such a reason was a legitimate ground for administering corporal punishment. While a teacher can use physical disciplinary measures to enforce instructional commands and punish misconduct, the court could not "accept the proposition that a teacher may use physical violence against a child merely because the child is unable or fails to perform, either academically or athletically, at a desired level of ability, even though a teacher considers such violence to be 'instruction and encouragement.' " The court reversed the trial court and remanded the case for a new trial.'[5]

The Oklahoma administrator is thus free to administer reasonable disciplinary force. What is reasonable depends upon the circumstances of each case. Procedural requirements, such as a hearing and notice of the reason for the punishment have not been imposed by the Supreme Court.

After the *Ingraham* decision, the *American School Board Journal* suggested fifteen guidelines that should be considered by boards in implementing school policies regarding corporal punishment:

1. Insure that the local policy does not violate any state law;

2. Examine community attitudes to determine whether to permit or prohibit corporal punishment. A general rule would be to authorize discipline measures used by the average, responsible parent in the local community;

3. Provide student handbooks containing the responsibilities required of students in the system so that pupils will know certain conduct might lead to punishment;

4. Make sure the school faculty clearly understands what student conduct permits paddling. For example, policies usually prohibit corporal punishment for academic deficiencies;

5. Define those who have authority to paddle students, which would include the classroom teacher, a teacher who witnessed the conduct, the principal or his designate. Those who would not be allowed to paddle would be other students, secretaries and custodians;

6. Make a determination of students who are exempt from paddling. For instance, the Supreme Court in *Ingraham* praised the board policy of Dade County, Florida, the defendant in the case. That policy prohibited the paddling of students who had psychological or medical problems. The policy should state that the parent has the responsibility to notify the administration of the child's problem and provide the documentation necessary to prove an exemption is required for medical or mental reasons;

7. Avoid excessive punishment through rules that describe how much paddling is too much. Policies might prohibit certain instruments that could be used for paddling and limit paddling for certain age groups;

8. Define the instrument to be used for paddling. The article suggested a paddle small and thin so that it would break if a teacher attempted to use excessive force. Courts have determined several means of punishment as being improper: hitting a student with fists or kicking a pupil with feet; the teacher sitting on a student; and, the use of whips, pencils, wide straps, sash cords, heavy switches and pieces of flooring;

9. Define where to paddle. On the student's body the only place appropriate for paddling is the seat. For location, the article suggests punishment should not be given in front of classmates in an attempt to humiliate the student;

10. Provide minimal due process by telling the student what misconduct he has done; telling him why he is being charged — the teacher saw the conduct or the student has admitted it; and, allow the student to give his version of the incident;

11. Provide for an adult witness to be present when a student is paddled. The school can insure a defense to any possible law suit for the use of excessive force by having an adult present who can testify the teacher told the student of the misconduct, of the evidence against him and allowed the student to try to explain his actions. Also, the witness would deter any excessive force by the paddling teacher;

12. The article suggests that a brief written report of the paddling should be placed in the student's file after the punishment is administered. The report should state the rule broken and the number of strokes given;

13. Although never required by a court, the article holds that schools will be better protected if paddling is administered by a teacher of the same sex as the pupil;

14. Be careful about punishing for out of school conduct that does not have a direct negative effect on conduct in school. Out of school activities covered could be field trips, athletic events, school transportation, and the completion of school assignments: and,

15. Avoid conflict between parents and teachers by not punishing students for an offense caused by a parental command. An example would be failure to participate in an extracurricular activity because the parent requires the student to be home doing farm chores.[6]

FOOTNOTES

1. *Baker v. Owen*, 395 F.Supp. 294 (M.D. N.C. 1975), aff'd mem., 423 U.S. 907 (1975).
2. *Ingraham v. Wright*, 45 U.S.L.W. 4364 (1977), 51 L.Ed2d 711 (1977).
3. *Gordon v. Oak Park School District No. 97*, 320 N.E.2d 389 (App. Ill. 1974).
4. *People v. Smith*, 335 N.E.2d 125 (Ill. 1975).
5. *Hogenson v. Williams*, 542 S.W.2d 456 (App. Tex. 1976).
6. "Fifteen things you need to know about corporal punishment in schools," *The American School Board Journal*, October, 1977, pp. 30-31.

CHAPTER 4

STUDENT SUSPENSIONS: DUE PROCESS PROCEDURES

In recent years increased procedural requirements have been imposed upon school administrators in regard to the suspension or expulsion of students. In *Goss v. Lopez,* 419 U.S. 565 (1975) the United States Supreme Court held that the Fourteenth Amendment's guarantee of due process protection against the deprivation of "life, liberty or property" applies to students. The Court ruled that a student has a "property" interest in receiving an education because the state offers a "free public education" and also compels juvenile attendance in school. In addition, the Court held that a student may be deprived of a "liberty" interest through a suspension because personal reputation and integrity are affected. To protect these property and liberty interests, certain due process procedures must be implemented by the school official whenever a student is suspended. Although the term "due process" is vague, basically it means what is "fair" and "reasonable" under the circumstances. The Court determined that certain minimum procedures were reasonable and must be employed by the school before any suspension:

1. The student must be given oral or written notice of the charges made against him;
2. If the student denies the charges, he must be given an explanation of the evidence against him; and,
3. The student must be afforded an opportunity to present his side of the story.

The Supreme Court did not require any "delay between the time when notice is due and the time of the hearing." The Court noted that in most suspension cases due process would be satisfied by an informal discussion immediately after the occurrence of the misconduct. During such discussion, the student should be told the accusation against him and be given an opportunity to explain his version of the facts. In addition, the Court approved an exception to the general rule that notice and a hearing have to be provided to the student before the actual suspension can begin. "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." In such a case, notice and a hearing should follow "as soon as practicable." However, the Court did feel that a hearing should at least be held within 72 hours of the immediate removal from school.

The *Goss* decision clearly stated that the opinion only applied to

short term suspensions of ten days or less. "Longer suspensions or expulsions may require more formal procedures."

A. SUSPENSIONS AND "DUE PROCESS"

The very term "due process" is baffling because by its very nature it is incapable of being rigidly defined. Due process is what is fair under the circumstances and circumstances change. As one court stated, "the requirements of due process are sufficiently flexible to accommodate themselves to various persons, interests and tribunals without reduction to a stereotype and hence to absurdity."[1] The United States Supreme Court has declared "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[2]

What is the "due process" required in a student suspension?

B. NOTICE

In *Goss* the Supreme Court held "at the very minimum . . . students facing suspension . . . must be given some kind of notice and afforded some kind of hearing." What form of notice satisfies the *Goss* requirements?

Goss held the notice should contain "the charges against" the student. A pre-*Goss* decision held a student had not been adequately informed of the nature of the charges against him. The suspension letter to the student and parents stated the student "continues to conduct himself in an irresponsible and disruptive manner . . . to be defiant of reasonable requests and demands made by teachers . . . attitude and conduct have done much to create trouble far beyond that usually created by a single student. His continued contempt for reasonable authority is evident in some way almost every day . . . On three occasions within the past few weeks James has been deliberately defiant of reasonable requests by teachers and in connection with one of these incidents, James used profanity in a loud manner. One of these incidents involving refusal occurred only yesterday, May 21."

The court quoted from *Linwood v. Board of Education, City of Peoria, School District No. 150*, 463 F.2d 763 (7th Cir. 1972) in which that court held the notice should be fairly specific and approved a suspension letter stating the student was "charged with gross disobedience and misconduct for allegedly attacking and striking other students in the halls of the school on September 10, 1970." The *Linwood* court believed the notice was specific enough to inform the student what conduct required an explanation. Based on *Linwood* the court held the letter in the case before it did not meet this due process standard. The letter needed "approximate dates and at least some recitation of detail significant enough to identify the conduct to the plaintiff."[3]

Thus, in the notice, a statement of the reason for the proposed suspension should be stated which does not use vague terms that would fail to inform the student of what he is charged with. In the

above case, the notice charged the student with acting in an "irresponsible and disruptive manner," being "defiant of reasonable requests," exhibiting "attitude and conduct" which created trouble and maintaining "continued contempt" of authorities. The superintendent should have briefly stated what the "conduct." What act did the student perform that was disruptive, and what was his "defiant attitude?" Did he talk back to a teacher, when, and what was he requsted to do? Where did he curse and to whom was it directed? The notice does not have to be lengthy to include some when, where and what specifics.

Another court decided the notice did not reasonably state what student conduct was being used as the basis for an expulsion. The court ruled that it was necessary that the student "should be apprised with some particularity of the offense with which he is charged." Although the notice need not be drafted "with the precision of a criminal indictment," it should contain a "statement of the specific charge and grounds, which, if proven would justify discipline." The notice which the court found to be deficient stated:

> The administration is recommending to the school that (student's name) be expelled from school for the remainder of the school term because of his participation in the disruption of activities at Texarkana High School on February 17, 1971. The school board will act on the recommendation at a special meeting beginning at 7:00 Friday, February 26, 1971.[4]

Another court found notice to be insufficient because "the failure to inform the plantiffs of the time and place of the board meeting was violative of their right to procedureal due process, for fundamental to that concept is adequate notice and the opportunity to be heard."[5]

In one suspension case, the court declined to accept the argument of the student that due process included the names and addresses of the witnesses who were expected to testify against the student at the hearing and a brief statement as to the testimony each would provide.[6] However, some courts have concluded that due process does include such a list of expulsion cases. The *Goss* decision clearly stated that the notice and hearing requirements it prescribed only applied to suspensions of ten days or less and that longer suspensions might require more due process guarantees. Thus, the Fifth Circuit has held that in expulsion hearings, due process includes giving the student "the names of the witnesses against him and an oral or written report on the facts to which each witness testifies."[7] The Kansas Supreme Court concluded, in an expulsion case, that "what is to be considered a 'sufficient' statement must depend on the circumstances in each particular case, but at least the substance of the charges and the name of the principal witness to support them should be supplied the student in the notice."[8]

Must notice be provided immediately after the incident? One court held accumulated incidents could be covered in one notice and did not require a separate notice for each event. "The court sees no constitutional issue involved in whether notice of each charge brought by a teacher be given the the exact time of the incident in question or at a subsequent date before the suspension hearing."[9]

The *Goss* decision did allow either oral or written notice. Written notice is preferred because it prevents a later swearing match in court between the administrator and the parent and/or student about what the oral notice contained. In one decision the court ruled the administration had no alternative but to provide oral notice of suspension. On Thursday the students conducted a walk out. On Friday they could not be notified of their suspension because they were marching on the superintendent's office. On Friday afternoon the suspension was read over the radio. The court found the students were not deprived of due process. Their immediate suspension was justified under *Goss* because the academic process had already been disrupted by the student strike. The most appropriate notice of immediate suspension that the superintendent could deliver was via the announcement of suspension over the radio with an opportunity for a hearing on Monday.[10]

C. WHO CAN PRESIDE AT THE SUSPENSION HEARING?

Normally, the principal will conduct the hearing in his office. Due process requires an impartial decision maker. Are there circumstances when a principal would be deemed partial against the student?

A student was selling an "underground" newspaper near the high school. Such distribution violated school rules. The principal purchased a copy, which contained obscene language. Although the principal instructed the student to stop selling the newspaper, the student continued to pass out his product. The principal took the student to his office and called the parent to inform her the student was being suspended. The student, as he left the principal's office, slammed the door and shouted profanity which was heard by the principal's secretaries. While on immediate suspension and before his suspension hearing, the student again appeared near the school campus and sold his paper. Once again the principal told him to stop. The student cursed at the administrator and the principal then called the police, who arrested the student. The suspension hearing was conducted before the principal. The judge declared that if the facts demonstrated "that a school official's involvement in an incident is such as to preclude his affording the student an impartial hearing" some other administrator or teacher than the principal should be designated to make the decision. Although school administrative personnel involved in the initiation and investigation of charges against a student are not *per se* disqualified from conducting hearings related to those charges, the facts of a particular case may indicate the administrator could not be impartial. In this case, the court recognized the student had been suspended for acts cast largely in terms of a personal confrontation with the principal. On two occasions the student used profanity at the principal and the second attempt to distribute the paper was a direct challenge to the principal's earlier order. The court concluded it was "difficult to imagine that" the principal could have provided an impartial hearing for the student.[11]

In another case the student attracted around 200 students as he

read a "list of demands" against the administration. The gathering blocked access to the college bookstore and stairways to classrooms. The dean appeared and asked the crowd to disperse. The plaintiff refused. The dean left and later the plaintiff also left the building. The plaintiff was sent notice of his proposed suspension. The hearing was held in the dean's office and the dean was the charging party. However, even though the dean conducted the hearing, he did not vote on the committee's decision. The plaintiff claimed the dean's participation in the hearing process was a denial of constitutional due process guarantees. The court found the hearing in the dean's office was fair, and thus did not violate due process. Neither was the dean's conduct such as to afford the plaintiff a partial hearing panel.[12]

Another student claimed a denial of due process because the superintendent was in the position to make the hearing officer his "rubber stamp." This hearing was an appeal of an informal hearing decision to suspend. The court held the hearing officer should not be the principal who had conducted the first informal hearing. Nor could one in his chain of command conduct the second hearing. However, any superior of the principal would be qualified.[13]

D. HEARSAY AS EVIDENCE

The Fifth Circuit Court of Appeals reviewed a case in which the principal, as the main witness in the suspension hearing, had in some instances first hand knowledge of the office, in some instances learned facts from reports and attendance records, but mainly had presented evidence which "consisted of reading or reciting statements made by the teachers in response to his inquiries." Did such hearsay, statements from out-of-hearing witnesses, deny the student of due process? The court held the use of hearsay did not violate due process. The court stated:

> Basic fairness and integrity of the fact-finding process are the guiding stars. Important as they are, the rights at stake in a school disciplinary hearing may be fairly determined upon the 'hearsay' evidence of school administrators charged with the duty of investigating the incidents. We decline to place upon a board of laymen the duty of observing and applying the comon law rules of evidence.[14]

In another decision, the court did not allow hearsay evidence to be sanctioned. However, in this set of facts there was no proof the one who made the statement which was hearsay had any first hand knowledge of the incident. Three students were notified of a board suspension hearing. While the hearing was in process someone called the board and stated one of the plaintiffs, who was not at the hearing, had been involved in a school altercation that night during a basketball game. The informant's information was not based on anything the informant had seen. The superintendent answered the phone call and told the board what the informant, who had not seen the basketball incident, had told him. The board made no attempt to verify the information

supplied by the teacher-informant. The court held the board's decision was based, at least in part, not on the infraction alleged to have occurred in the original purpose for the hearing, but on the separate and unsubstantiated charge that one of the plaintiffs had been involved in a fight at a ball game. None of the plaintiffs had, of course, been provided notice of this charge since the charge was not made until after the board hearing began. Thus, the students were denied of their opportunity to present their side of the case.[15]

Thus, hearsay collected by the principal or other administrator during an investigation of an incident can be used in a suspension hearing. Provided, that those supplying evidence had actually seen or heard what they reported to the administrator.

E. RIGHT TO COUNSEL

In *Goss* the Court stated that it had stopped short of requiring the student be afforded the opportunity of obtaining counsel for short term suspensions.

The Seventh Circuit has held a student was not entitled to the appointment of counsel at public expense.[16] Another decision stated:

> I find no practical advantage to the pupil and/or his parents having the right to be represented by an attorney at any informal hearing with the principal, nor do I understand plaintiffs' counsel to make this request. On the other hand, there should be no prohibition against a principal permitting, in his discretion, the attendance and advice of counsel at such informal hearing.
>
> Assuming that the formal hearing will be conducted before a fair and impartial hearing officer or tribunal, I do not think it is a necessary ingredient of due process that the pupils and/or his parents have the right to be represented by legal counsel.[17]

One court held that the presence of counsel was not mandatory when school counsel was not present, but when the school is represented by an attorney, then the student should also be allowed legal counsel.[18]

The Fifth Circuit has held no right to counsel is present, even in an expulsion hearing.[19]

F. THE ROLE OF THE SCHOOL ATTORNEY

In one hearing the five board members sat at a table along with the witnesses against the student and the school attorney. During the hearing the school attorney acted as:

1. Prosecutor of the school's witnesses;
2. Judge, who ruled on the student's motions and objections; and,
3. Advisor to the board of education.

The court opinion stated:

Goss teaches us that our inquiry need be directed only to ensuring that the rudiments of fair procedures be followed. As long as a student is given a formal hearing by the school board and is represented by counsel, the court feels it is reasonable for the school solicitor to prosecute the case against him or her, rule on evidentiary questions, and advise the board as to possible action.

The court thus holds that for a thirty-day suspension, it is not unconstitutional for the school solicitor to act in the dual roles of prosecutor and advisor to the school board as long as the student is represented by counsel and given an opportunity to present his side of the story. In the nature of things, it is the solicitor's duty to appear for the board. Outside counsel need not be engaged.[20]

Again, another court has held that if the school is represented by an attorney it is only fair for the student to be allowed legal representation. Especially in the informal hearing before the principal, the presence of attorneys will likely formalize and lengthen the hearing process.

G. RECORD OF THE HEARING

Some students have insisted that due process affords them the right to a transcript of the hearing. However a court has determined that the subject of a record goes beyond the due process required for a hearing and that the student does not have to be notified that a record can be made of the proceedings.[21]

H. UNANIMOUS DECISION

Does due process require a unanimous decision for suspension when there are plural decision-makers? The Seventh Circuit said no.[22] Likewise, the Supreme Court of Vermont has rejected the argument that a unanimous decision is part of the student's due process rights.[23]

I. TIME OF THE HEARING

How soon shall the hearing be conducted? A Texas court stated a student should be allowed a reasonable time to prepare his defense but the time may always be shortened at the request of the student. The student therefore cannot complain if the school abides by his request.[24] A federal court held 20 day notice before the hearing was certainly fair notice of a high school suspension hearing.[25] In practice, most schools schedule an informal hearing within three to ten days of the notice, while the memories of the witnesses are still fresh. Remember, when the student is immediately removed from school, *Goss* requires the hearing to be conducted within 72 hours of the removal.

J. MIRANDA WARNINGS

A student admitted to the principal that she was responsible for three false fire alarms which had required the evacuation of 4,000 students and 200 faculty members. The student was taken by school authorities to the police station after the confession. The student contended that the principal should have given her the *Miranda* warnings before questioning her. The court did not agree that such warnings are part of due process procedures in student suspension cases:

> Miranda warnings are not a requisite of due process but a condition to the admissibility in a criminal prosecution of statements obtained from a defendant questioned while in custody or otherwise significantly deprived of his freedom of action.[26]

K. STUDENT VIOLATION OF CRIMINAL LAWS; THE PRIVILEGE AGAINST SELF INCRIMINATION

A student commits a criminal offense. What can the school do while the case is pending? Usually, the school has no evidence in regard to the alleged criminal activity. But sometimes the criminal act and school activities spring from the same set of facts. Can the school suspend the student while the criminal case is pending?

A student was engaged in unlawful activities during a campus demonstration. As a result of these actions, criminal charges were filed against the student. The school also sent the student notice of a suspension hearing for his conduct in the demonstrations. The student sought court relief, requesting that the suspension hearing be enjoined until after the criminal proceedings, which arose out of the same set of circumstances, were completed. The plaintiff contended that if he testified in the suspension hearing, he would be denied his Fifth Amendment rights against self incrimination because his testimony before the school trustees might be used against him in subsequent criminal trials. The court denied the relief. The decision stated that based upon the United States Supreme Court case of *Garrity v. New Jersey*, 385 U.S. 493 (1967) the student could invoke the Fifth Amendment during the criminal trial if his suspension hearing testimony was sought to be used against him. Thus, the coming school hearing posed no threat to his Fifth Amendment rights.[27]

Similarly, when an officer discovered marijuana in the car of a student at a military academy, both criminal charges and a suspension hearing were set. The court held the school was not required to postpone the disciplinary proceeding until the criminal charge was disposed of. Thus the officer, a school employee, could present his evidence at the school hearing and the student could testify in his defense if he so desired.[28]

In another decision, a student was charged with burglary, attempted rape and assault. The acts allegedly occurred in a college dormitory. The court held the school could proceed with the suspension

hearing.[29] One court stated that to restrict a school from a suspension hearing until after the criminal action was completed would be like telling the owner of stolen property that he could not sue the thief until after the thief's criminal proceedings were terminated.[30]

L. DOUBLE JEOPARDY

A student was suspended by the principal for 10 days. After readmission, the student was sent notice by the superintendent that he would face an expulsion hearing. Both the suspension and the expulsion were based on the same incident. The student sought court relief, claiming that the superintendent did not have the right to expel for the same reason arising from the same conduct as the suspension punishment. Thus, the student would be punished twice for the same offense. The court ruled "the doctrine of former jeopardy is limited to criminal cases. Since the matter before us is civil in nature, the Constitutional provision does not pertain." The court noted that the student could be suspended while the superintendent reviewed the case to determine if expulsion was necessary.[31]

M. THE BURDEN OF PROOF

How much proof is required of a school official in a student suspension hearing?

The Seventh Circuit ruled the school did not have to prove the offense "beyond a reasonable doubt."[32] If the criminal burden of proof is not required, what degree of proof is needed?

In a campus disturbance the plaintiffs, along with others, were arrested and charged with participating in an unlawful assembly, disturbing the peace and refusing to disperse. The only evidence against the students was a 14 page police report. The first 2 pages presented a general account of the campus incident while the remaining 12 pages listed the names of the 454 who had been arrested. The plaintiffs were among these names. The court stated "nowhere else in the report is there any mention made of the plaintiffs, nor is there any statement as to their particular conduct. This is far short of *substantial proof* of misconduct."[33] Another decision, basing its authority on a law review article, stated the burden of proof for the school was "substantial evidence."[34] The Kansas Supreme Court defined "substantial evidence" as "evidence which possesses something of substance and relevant consequence and which furnishes a substantial basis of fact from which the issues can be reasonably resolved."[35]

A federal court, however, has held school administrators do not have to have a record of "substantial evidence" when the court reviews the suspension hearing. The court held the "substantial evidence test" contended for by the plaintiffs as the proper burden of proof for the administrator does "not have its origin in the due process clauses of either the Fifth or the Fourteenth Amendments." The court noted that the substantial evidence test, as applied in federal courts, was the standard for direct judicial review of administrative decisions coming

to the courts under either the Administrative Procedure Act or the explicit provisions of the statutes creating administrative agencies whose decisions are subject to judicial review. The substantial evidence standard, therefore, is not a constitutional requisite but one established by specific legislative language.

The court noted that "substantial evidence is more than a scintilla. It is akin to that quantum of proof which would oblige a judge to refuse to direct a verdict when the conclusion sought to be drawn is one of fact for a jury. As such it probes deeper into the record than does a review for fairness which is the essence of a due process inquiry." The court concluded that the test for proof in suspension hearings should be whether the administrator presented "some evidence." If he did, then due process is satisfied. However, if the charge against the student involves First Amendment rights (free speech, press) then:

> In such circumstances a federal court arguably should require that there be substantial evidence that the conduct of a particular student had exceeded the scope of First Amendment protection before that student could be disciplined. Such standard, however, would be imposed to protect against an infringement of the First Amendment, not as a general due process standard.

The court, in non-First Amendment situations, refused to impose the "substantial evidence test" as the rule by which federal courts would review suspension hearings. "While a state court sitting in review of its own state's educational institutions might fashion such a standard for review, a federal court . . is confined to determining whether the challenged proceedings meet the minimal standards of due process of law."[36]

N. THE STUDENT'S RIGHT TO CROSS EXAMINATION

Goss held that in regard to short term suspensions the Court stopped short of extending due process to cover the student's right "to confront and cross examine witnesses supporting the charge or to call his own witnesses to verify his version."

A 1971 Texas decision held that cross-examination was not a "matter of right" in a suspension hearing.[37] Another decision held in an expulsion "a full dress judicial hearing, with right of cross-examination, is not required, but a right to present a defense, by oral testimony or affidavits is."[38]

The Kansas Supreme Court decided that outside of the criminal area, cross-examination is not an absolute right but depends upon a case by case assessment of the situation. Although the court did not object to affidavits when testimony was of a minor nature, when the "outcome was directly dependent upon the credibility" of two witnesses whose statements were conflicting "then cross-examination is imperative in establishing the truth, absent compelling reasons for dispensing with it." The court did add that the school could limit the scope of cross-examination to prevent the badgering of witnesses. In the case

before the court there was no reason present for the nonappearance of the witnesses.[39] A 1976 decision by the Oklahoma Court of Appeals, in regard to a small claims suit, cited the Kansas opinion and stated "the right to cross examine is not an absolute right. The use of an affidavit is permissible when testimony is cumulative or of minor importance, but when the outcome is directly dependent on the document it should not be admitted."[40]

O. ANONYMITY OF STUDENTS

Can a student submit information concerning a suspension hearing and remain anonymous, thus preventing the student from cross examining that unknown student?

A federal court considered this issue. A student did supply information to the principal but requested to remain anonymous for fear that the student against whom the suspension charge was made might seek revenge against him. The court stated due process was fulfilled when the student was allowed to explain his side of the story and to challenge the facts submitted against him. He had the right to confront and cross examine the witnesses of the administrator and to confront the facts which the administrator has disclosed.

> Procedural due process in a pre-suspension hearing conducted by a school principal or school administrator on the school's premises does not require that the anonymity afforded to students who forward information to a school principal or administrator be destroyed.
>
> The court declines to impose the requirements of confrontation and cross-examination of student witnesses or accusers as a necessary element in the on-the-premises hearing which must be conducted by a school principal or administrator before a student is suspended.[41]

P. WAIVER OF HEARING

After a suspension, a conference was held between the principal, the student and the student's father. The principal told the student he would be reinstated but he also warned the student and the father that if the student were suspended again he would have to contact the associate superintendent and apply for reinstatement. The student was suspended for the second time. The principal called the father, explained the facts to him and reminded him that he would have to contact the administration for redress. The parent made no effort to contact the administration. No hearing was held. The court found there was no denial of due process. The student and the father had been told what procedures to follow and the failure to so follow the instructions "amounted to a waiver of the right to any hearing."[42]

Q. RULES WHICH VIOLATE DUE PROCESS

The suspension of a student may violate due process when the student is removed from school for not following an invalid school rule.

In 1976, the Oklahoma Supreme Court held school boards could not suspend students for the violation of hair code regulations. Although the Court recognized "there is no doubt that the rule making power of local school boards includes the area of student conduct, as the legislature has also provided that student compliance with rules may be enforced through suspension from school," this authority to suspend students was not absolute. The court held:

> We are convinced that the scope of a school board's rule making authority is limited to adopting rules that have a reasonable connection with the educational function entrusted to it by the public.
>
> In view of the explicit state commitment to the education of each child, it is certain that while a student's right to the present in school is not absolute, any rule which would exclude him must exist for a reasonable and necessary purpose. Otherwise the loss of an education could result from failure to conform to a purely arbitrary standard.
>
> It is clear that the rights and interests of students and their parents are not absolute and that at times the very nature of our public school system demands that their interests yield to the authority of the school board. It is equally clear that the scope of the school board's power is not unrestricted. Only through the existence of a reasonable connection between the rule and a proper purpose of the educational function of the school can a balance of these competing interests be achieved.
>
> While the intention of the hair length provisions of a public school dress code is to control hair length for 24 hours a day and out-of-school activity is regulated more than is in-school activity.
>
> A school board rule imposing a significant invasion into the private lives of children and their parents requires a showing of greater justification and demonstrable need by the school board than one regulating pure in-school behavior.
>
> Absent a clear showing of a reasonable connection between a dress code adopted by a school board and proper educational functions, the adoption of such a rule is violative of statutory authority granted school boards to adopt rules governing student behavior.[43]

In summary, a school discipline rule leading to the suspension of a student must be reasonably related to the educational purposes of the school. Recently, an Oregon court determined a no smoking rule concerning on-campus but outside of building spaces was connected with an educational purpose.[44] A Pennsylvania court sanctioned expulsion for possession of cigarette rolling devices, papers and 28 grams of marijuana.[45]

Even though a policy is related to education, the rule might violate due process if it is "overbroad." Such a policy not only prohibits conduct which the school can control but also conduct not offensive to the educational function of the school system. When this occurs, courts find the rule gives a "chilling effect" on the exercise of constitutionally protected rights. In addition, a policy may be struck down because it is "vague." Vagueness means a student cannot ascertain from the lan-

guage of the rule what conduct is prohibited. A federal court recently decided a school code prohibiting "flagrant disrespect of teachers," "loitering in areas of heavy traffic," and "rowdy behavior in areas of heavy traffic" was not overbroad or vague. Although the rules should inform the student of what acts are prohibited, the court noted the same specificity was not needed as is used in criminal proceedings.[46]

FOOTNOTES

1. *Boykins v. Fairfield Board of Education*, 492 F.2d 697 (5th Cir. 1974).
2. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).
3. *Keller v. Fochs*, 385 F. Supp. 262 (E.D. Wisc. 1974).
4. *Texarkana Independent School District v. Lewis et al.*, 470 S.W.2d 727 (Civ. App. Tex. 1971).
5. *Strickland v. Inlow*, 519 F.2d 744 (8th Cir. 1975).
6. *Linwood v. Board of Education, City of Peoria, School District No. 150*, 463 F.2d 763 (7th Cir. 1972).
7. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961).
8. *Smith v. Miller*, 514 P.2d 377 (Kan. 1973).
9. *Alex v. Allen*, 409 F. Supp. 379 (W.D. Pa. 1976).
10. *Sweet v. Childs*, 518 F.2d 320 (5th Cir. 1975).
11. *Sullivan v. Houston Independent School District*, 425 F.2d 1071 (5th Cir. 1973).
12. *Haynes et al. v. Dallas County Junior College District*, 386 F.Supp. 208 (N.D. Tex. 1974).
13. *Everett v. Marcase*, 426 F.Supp. 397 (E.D. Pa. 1977).
14. *Boykins, supra*, note 1.
15. *Strickland, supra*, note 5.
16. *Linwood, supra*, note 6.
17. *Everett, supra*, note 13.
18. *Texarkana, supra*, note 4.
19. *Dixon, supra*, note 7.
20. *Alex, supra*, note 9.
21. *Texarkana, supra*, note 4.
22. *Linwood, supra*, note 6.
23. *Nzuve v. Castleton State College et al.*, 335 A.2d 321 (Vt. 1975)
24. *Texarkana, supra*, note 4.
25. *Alex, supra*, note 9.
26. *Betts v. Board of Education of City of Chicago*, 466 F.2d 629 (7th Cir. 1972).
27. *Furutani v. Ewigleben*, 297 F. Supp. 1163 (N.D. Cal. 1969).
28. *Keene v. Rogers*, 316 F. Supp. 217 (N.D. Me. 1970).
29. *Nzuve, supra*, note 23.
30. *Goldberg v. Regents of University of California*, 57 Cal. Rptr. 463 (1967).
31. *State Ex Rel. Fleetwood v. Board of Education*, 252 N.E.2d 318 (App. Ohio 1969).
32. *Linwood, supra*, note 6.
33. Wong *v. Hayakawa*, 464 F.2d 1282 (9th Cir. 1972).
34. *Keene, supra*, note 28.
35. *Smith, supra*, note 8.

36. *McDonald v. Board of Trustees of the University of Illinois et al.*, 375 F. Supp. 95 (N.D. Ill. 1974).

37. *Texarkanda, supra*, note 4.

38. *Dixon, supra*, note 7.

39. *Smith, supra*, note 8.

40. *Lee Wayne Company, Inc. v. Pruitt*, 550 P.2d 1374 (Ct.App. Okl. 1976).

41. *Graham v. Knutzen*, 351 F.Supp. 642 (Neb. 1972).

42. *Grayson v. Malone et al.*, 311 F.Supp. 987 (Mass. 1970).

43. *Independent School District No. 8 of Seiling v. Swanson*, 553 P.2d 496 (Okl. 1976).

44. *Randol v. Newberg Public School Board*, 542 P.2d 939 (App. Ore. 1975).

45. *Giles v. Marple Newtown School District Board of Directors*, 367 A.2d 399 (Pa. 1976).

46. *Alex, supra*, note 9.

CHAPTER 5

SCHOOL REGULATIONS BASED UPON THE PARENTAL OR MARITAL STATUS OF STUDENTS

School regulations frequently attempt to curtail the activities of students who have parental or marital status. As one wag stated "when teenagers combine wedding bells with school bells, the resulting commotion may sound like fire alarm bells to superintendents and boards of education. The chaos and confusion increase in intensity for both pupils and educators when wedding rings, engagement rings and teething rings are exchanged at the same time."[1]

Although courts in the past sanctioned regulations which imposed restrictions upon married students, recently courts have struck down all such school policies. Married students, however, do have a different status to unmarried students in regard to compulsary school attendance laws. Court opinions have held married students are now emancipated from their parents and being considered adults are no longer subject to compulsary attendance laws. The Oklahoma Attorney General concurred with this reasoning in an opinion issued in 1949.[2]

Some school boards have attempted to permanently exclude students from school because they are married. When students have contested these practices in court they have been successful in persuading the judges to declare such rules invalid. For instance, the military academies have always prohibited student marriages. In 1973, a federal court ruled that the United States Merchant Marine Academy could not expel a cadet because, contrary to the agreement he had made with the Academy upon admission to the school, he had married. The court determined the right to marry is a fundamental right protected by the Constitution, and, therefore, the prohibition of marriages by the Academy could be justified only if the institution could demonstrate a "compelling governmental interest" allowing suppression of the student's basic right to marry. The court concluded that expelling a student because of his or her marital status would be tolerated only if the school could present a "clear and convincing demonstration that the welfare or discipline of the other pupils of the school is injuriously affected by the presence of married students."[3]

The courts, therefore, have imposed stringent standards for anti-student marriage regulations to meet, especially since the courts find a traditional public policy which favors matrimony. Temporary suspensions from school have not fared any better in the courts than have permanent exclusions. A Kentucky board of education imposed a pol-

icy which required students who married to withdraw from school at the beginning of the next school term. This policy was voided by the court.[4] Similarly, a Texas court struck down a regulation requiring a three week suspension after the marriage ceremony. Although the policy had been implemented to allow newlyweds a time of adjustment to married life, the court decided "marriage is not alone a proper ground for a school district to suspend a student."[5]

Until the 1960s, many courts accepted regulations which curbed the rights of married students to participate in extracurricular activities. However, decisions in the 1970s have not hesitated to invalidate such regulations. Courts now reject the arguments of school boards that extracurricular functions are not essential to a student's public education. Opinions now declare that extracurricular activities are "an integral and complementary part of the total school program."[6] Thus, to restrict a child's participation in such activities deprives the student of an important segment of public education. Usually, the courts require the school to show a "compelling interest" for the prohibition before the court will uphold the regulation. School boards have not been able to meet this standard of proof. Courts have rejected the arguments of schools that student marriages contribute to dropping out of school, the disruption of school functions or the corruption of the morals of single students.

A seventeen year old Indiana high school student married a 16 year old student. Two weeks after the marriage the bride gave birth. The student, who was involved in the school's athletic program, was not allowed to play on sports teams because of district policy and rules of the Indiana High School Athletic Association, which disallowed such participation by married students. The student sought court relief. The court had to determine whether the rules and school policy violated equal protection of the laws as guaranteed by the Fourteenth Amendment. The school attempted to justify the policy for the following reasons:

1. Married students need more time than single students do for economic and family responsibilities. Participation in extracurricular activities interferes with these important responsibilities.

2. Teenage marriages should be discouraged to reduce the divorce and drop out rates among married students.

3. Athletes are heroes to other students, and since teenage marriages usually result because of a pregnancy, to retain these models on sports teams would encourage immorality.

4. The policy prevents undesirable "locker room talk" and unwholesome interaction between married and unmarried students is thus curbed.

The court traced the history of such regulations and classifications in general in the courts. The "low tier" approach determined classifications imposed by government bodies were invalid if there was no "rational relationship" between the regulation and a proper governmental purpose. A "high tier" test had developed when the classification was applied to "suspect traits," such as race or national origin, or

impinged upon rights deemed "fundamental," such as the right to vote and freedom of association. Such classifications received "strict judicial scrutiny" and would not be allowed to stand unless justified by a "compelling governmental interest."

The court then discussed a new standard which had been developing. Under this test, the classification must be based on some ground of different treatment having a "fair and substantial relationship to the object" of the regulation. The judge determined the regulation was an unreasonable rule which did not fit the rationale for the policy, which was to deter immoral conduct by students. The policy, the court stated, prohibited *all* married students from extracurricular activities. Students of excellent moral character who married for love rather than because of a pregnancy were excluded from sports teams just as much as were those who were eliminated because they had married due to an unwanted pregnancy. Also, the policy violated the public policy of the state, which was to allow the parents to legitimate offspring resulting from premarital sex.

In addition, in regard to talented male athletes, the regulations not only deprived the students of a total educational experience and infringed upon their right to marry but also deprived the students of the opportunity to obtain collegiate athletic scholarships or employment as professional athletes.[7]

In addition to the reasoning of court opinions, whether based on the lack of a "compelling governmental interest" or a "rational" or "substantial relationship to the object of the rule," the federal government, through Title IX, prohibits schools that receive federal funds from limiting participation in any educational program because of a student's marital status when such rules differentiate on the basis of the student's sex.[8]

A few reported cases have upheld suspensions and extracurricular restrictions placed upon students because of their parental status, but these decisions are contrary to recent opinions and the position of the federal government. For example, the Fifth Circuit Court of Appeals has ruled that conclusive presumptions finding unwed pregnant school employees are immoral are unconstitutional.[9] The Supreme Court has also decided that school board policies presuming pregnant teachers are unfit to teach at a certain time in their pregnancy are unconstitutional because they are arbitrary and unreasonable.[10] Similarly, board policies requiring that pregnant students must withdraw from school would violate due process by arbitrarily denying the student an education.

Discipline based on parental status which applies only to female students violates Title IX regulations. No recipient of federal money is allowed to impose any regulation "concerning a student's actual or potential parental, family or marital status which treats students differently on the basis of sex."[11] Because female students have primarily been the subjects of discipline for parenthood, such discipline often involves sex discrimination.

Title IX forbids a school from excluding a pregnant student from

extracurricular activities solely on the basis of pregnancy. Only if a physician certifies that the program is determental to her health can the pregnant student be excluded. The school can require a pregnant student to submit a physician's report stating that she can still participate, but it can do so only if a similar requirement is placed upon all students who suffer some physical disability and want to again participate in a school activity.[12]

Schools often attempt to suspend students because they are unwed mothers. The policies are based upon the premise that such students "lack moral character" and will "contaminate other students and taint their educational experience." Recent decisions have stated the mere fact that the student is an unwed mother is insufficient to prove lack of moral character. Such a regulation again creates a "conclusive presumption" which the court feels is arbitrary because it does not account for exceptions to what the school feels is the general rule for student character. One court has demanded that an exclusion from school of an unwed mother based on a "lack of moral character" charge by proved by the school after written notice of the charges are sent to the student and a full scale hearing is conducted. At the hearing, the administration has the burden of proving that this particular student will taint the morals of other pupils if she is allowed to remain in school.[13]

Further, if a regulation of the school applies to unwed mothers and not to unwed fathers, the rule violates the equal protection clause of the Constitution and also Title IX because it discriminates against students on the basis of sex.

FOOTNOTES

1. Corns, "School Bells & Wedding Bells," 1 J. L. & Educ. 649 (1972).
2. Opinion, September 17, 1949.
3. *O'Neil v. Dent*, 364 F.Supp. 565 (E.D. N.Y. 1973).
4. *Board of Education of Harrodsburg v. Bentley*, 383 S.W.2d 677 (Ky. 1964).
5. *Carrollton-Farmer Branch Independent School District v. Knight*, 418 S.W.2d 335 (Tex.Civ..App. 1967).
6. *Davis v. Meek*, 344 F.Supp. 298 (N.D. Ohio 1972).
7. *Indiana High School Athletic Association v. Raike*, 329 N.E.2d 66 (Ind. 1975).
8. 45 C.F.R. Sec. 86.40.
9. *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975).
10. *Chesterfield County School Board v. LaFleur*, 414 U.S. 632 (1974).
11. *Supra*, note 8.
12. *Ibid.*
13. *Shull v. Columbus Municipal Separate School District*, 338 F.Supp. 1376 (N.D. Miss. 1972).

CHAPTER 6

THE TERMINATION OF TEACHERS

INTRODUCTION

The most controversial issue in the field of school law concerns the non-renewal and dismissal of teachers. The termination process divides communities and leads to numerous law suits. Therefore, knowledge of the termination procedure is a must for anyone connected with the legal aspects of education. The basic premise in understanding teacher removal is the "continuing contract" concept which means that unless a school board acts in compliance with the relevant statutes to terminate a teacher's contract the contract is automatically continued for the next fiscal year.[1] In other words, a contract continues until the board seeks to remove the teacher or the teacher elects to teach in another district or to retire.

Another basic concept is the process whereby teachers are severed from their contractual relationship with the school district. Teachers can be removed by either of two methods. The "dismissal" of a teacher terminates the teacher's contract as soon as the school board, for non-tenured teachers, or the hearing panel, for tenured teachers, determines at a hearing that dismissal is warranted. The contractual relationship is extinquished even though there may be many months left in the current fiscal year. The other method of removal is called "non-renewal." By this process, the board does not seek the immediate removal of the teacher from the district but instead holds the teacher will not return to the district for the coming fiscal year. When a contract is non-renewed the teacher continues to teach until the end of the school year.

When a board approves the superintendent's recommendation of dismissal, that vote informs the teacher of a "potential dismissal." If the teacher requests a hearing, the actual dismissal occurs when either the board, for a non-tenured teacher, or a hearing panel, for a tenured teacher, upholds the potential dismissal. If the teacher waives a hearing by not requesting one, then the actual dismissal occurs at the end of the 10 day period granted the teacher to ask for a hearing. The statute states the waiver finalizes the board's "initial determination" of dismissal. Thus, a teacher continues to receive pay until the actual dismissal occurs.

Dismissal can occur at any time of the year but the statute limits the time in which a board may vote for the non-renewal of a teacher. Any board seeking to non-renew a contract must vote to do so and send

the teacher notice of that decision by certified mail restricted delivery prior to April 10th.[2]

Also important in the termination process is the concept of tenure. The removal process for tenured teachers differs from that of non-tenured teachers because employees with tenure are entitled to more procedural protections. In Oklahoma, a tenured teacher is a "duly certified teacher who has completed three (3) or more consecutive complete school years of teaching service in one school district under a written teaching contract."[3]

The Oklahoma Supreme Court has ruled that the teaching of half-days during the school term counts just as much toward tenure as the teaching of a full day of classes does. Thus, any teacher who teaches for a half-day for three years has acquired tenure. Also, the fact that the major portion of a teacher's salary comes from federal rather than state funds has no bearing on tenure since the statutes only require that payment come from "public fund."[4] By statute, a teacher having tenure in one district does not lose that tenure when the teacher's school is annexed by another district.[5] The Attorney General has interpreted the law to require that the school stay in operation after annexation for tenure to attach. If the annexed school is closed by the annexing district the annexing district is not liable for paying compensation to that teacher, whether tenured or not, for the ensuing school year.[6]

The United States Constitution provides that the government cannot deprive one of "life, liberty or property" without due process of law. State constitutions also contain "due process" protection. When a teacher is deprived of continued employment in a school district is such a teacher entitled to due process guarantees? In *Board of Regents State Colleges et al. v. Roth*, 408 U.S. 564 (1972), the United States Supreme Court held that a tenured teacher has a protected "property" interest in continued employment and is thus entitled to due process procedures when terminated. Such procedures would include a statement of the reasons for the termination and a right of a hearing for the teacher to contest the charges. Because a non-tenured teacher does not have a continued expectation of employment, the teacher, as a matter of constitutional law, is not entitled to a statement of charges and a hearing because of the deprivation of a property interest. State law, however, can provide due process rights for non-tenured teachers.

Since procedural due process requirements are not constitutionally mandated for non-tenured teachers, absent state law provisions, the non-tenured teacher has no grounds to attack removal in the "property" interest field. The only redress left is to allege in federal court that the removal deprived the teacher of a "liberty" interest guaranteed by the Constitution. Usually, a non-tenured teacher will allege the removal was in retaliation against the teacher's exercise of the right of free speech. The teacher may also assert a "liberty" denial because the removal has so tarnished her reputation that she is deprived of future employment opportunities. Thus, school boards not required by state law to provide reasons for removal, have terminated

non-tenured teachers for the "best interest of the school system." Oklahoma's new law, by providing for a written recommendation by the superintendent for the removal of a teacher requires at least something be stated in writing. No statutory ground is needed. Whether the "best interest of the school system" will continue to suffice under the statutory "due process" afforded the non-tenured teacher will probably be determined by a court. Usually there is a reason for non-renewal and such reason can be demonstrated by the evaluation.

A tenured teacher who is removed is provided protection under Oklahoma law as to the statement of charges and hearing rights. Whether such charge is proved is a matter of state rather than federal interest. An Oklahoma federal court stated a federal judge does not have jurisdiction to decide whether or not a district was able to prove the charge of "wilful neglect of duty." According to the court, this "is a matter that is rightly the concern of the officials of the school districts and state courts." Any complaint filed with a federal court must allege a federal constitutional or statutory guarantee has been violated. The same opinion held "it is not within the province of the federal court to pass upon and decide the merits of all of the internal operative decisions of a school district. The only interest that this Court should have in the basis for non-renewal is to insure that it is not an impermissible reason that is prohibited by the Constitution of the United States."[7]

In summary, a tenured teacher is provided guarantees by state law. A statement of reasons must be given for the termination and the reasons must be restricted to the enumerated statutory causes for removal. The cause must be proved at a hearing, unless the teacher waives the hearing right. Appellate procedures are provided through the Oklahoma judicial system. A tenured teacher cannot seek to bypass the state route by going to federal court and alleging the statutory cause for removal was not proved by the administration at the board hearing. A non-tenured teacher has no appellate rights under Oklahoma law and can ask the federal court for relief only if the removal violated a constitutional right.

The new removal statute clarifies previous ambiguity in the relationship of an administrator to tenure. The law holds the "dismissal, suspension and nonreemployment procedures of this act shall apply to administrators only insofar as they have qualified as tenured teachers, and none of the provisions of this act shall grant tenure to an administrator acting in the capacity of an administrator." An administrator has teacher tenure status, not tenure as a superintendent, principal or other administrative position.

THE OKLAHOMA LAW

The teacher termination process was vastly changed by the state legislature in 1977 in hopes of more clearly defining the role of school administrators in the hearing process and eliminating the previous lengthy appellate structure which heard appeals *de novo* (a second time) from local board decisions.[8]

The law first provides for the evaluation of certified personnel. This evaluation process is important to teacher terminations because the evaluation has become part of the due process procedure to which every teacher is entitled.

"Following consultation or involvement by representatives selected by local teachers" school boards must form a written policy for the evaluation of all district teachers and administrators. In those districts where negotiations occur between the board and teacher unions the evaluation procedure is to be a negotiated item. This evaluation policy and any amendments made later must be "promptly made available to all teachers." These policies must include provisions stating that all evaluations are to be in writing and that the evaluation and teacher responses thereto are to be kept in the individual teacher personnel files.

The policy must also provide that all non-tenured teachers shall be evaluated at least twice a year, once before November 15 and once before February 10. All tenured teachers must be evaluated at least once every three years. Certified administrators designated by the board are responsible for making the evaluations. The evaluation of administrators must be included in the policy. The superintendent, however, because of his close working relationship with the board, is to be evaluated by that body. The scheme is for the principal to evaluate the teacher, the superintendent to evaluate the principal, the board to evaluate the superintendent and the public to evaluate the board. What if a school has no one certified by the State Department of Education as an administrator but has a teacher who is designated by the board as the teaching-principal? The Attorney General has ruled that the teaching-principal is qualified under the law to conduct the evaluation of teachers.[9]

A copy of all evaluations must be presented to the teacher, who shall acknowledge that the evaluation has in fact been made by signing the original. The signature does not mean the teacher agrees with the evaluation but merely admits this is the evaluation that has been completed. Within two weeks from the time the written evaluation is completed the teacher may submit a written response to her rating and this document must be placed in the teacher's file along with the evaluation. Evaluations and responses shall be available for inspection only by the teacher evaluated, the board of education, the administrative staff making the evaluation, the board and administrative staff of any district with which the teacher applies for employment, the hearing panel involved in a non-renewal or dismissal process and all other persons permitted by the teacher in writing to have access to the records. Caution would require that any teacher's written permission for inspection of the records should be dated and kept in the file.

Since the hearing panel in a non-renewal or dismissal proceeding will have access to the evaluations, these documents are important in determining the professional competence of a teacher. If the teacher receives good evaluations throughout the year the superintendent's task of convincing a hearing panel that the teacher should be termi-

nated becomes much more difficult if the conduct which the superintendent is complaining of was known during the evaluation process. It will be difficult for a superintendent to relate to the panel that the accusations against the teacher are serious when the problem was not serious enough to list on the evaluation form.

When the principal who has "administrative responsibility under the supervision of the superintendent of a school district to plan, manage, operate and evaluate the educational program of a particular school attendance area and who has carried out the provisions of Section 2 of this act (the evaluation) believes" an admonition of a teacher is necessary for a reason which may lead to the removal of a teacher, the principal shall:

1. Inform the teacher in writing of the problem and make a "reasonable effort" to assist the teacher in correcting the deficiency, and,

2. Allow a "reasonable time for improvement" which shall not be greater than two months. The "nature and gravity of the teacher's conduct" is to be considered in determining what is a "reasonable time for improvement."

Thus, when a principal involved in the evaluation process believes a teacher's conduct might lead to removal he must so inform the teacher in writing. The written warning could appear in the evaluation form itself if the problem is discovered in the evaluation process. If the conduct occurs at another time of the year, a separate written opinion by the principal must be made. Although not required by law, the warning should be dated and placed in the teacher's personnel file.

What is a "reasonable time" depends upon a common sense look at a particular problem. Although individuals will naturally attach different meanings to such a term, the statute does allow the seriousness of the offense to help determine what a reasonable time is for this particular teacher to improve. If the teacher fails to correct the problem within this reasonable time then the principal shall recommend to the superintendent that the teacher be terminated.

If the principal fails to carry out these procedures the teacher can claim a denial of due process because no written statement of the problem was provided, no "reasonable effort" was made to assist the teacher in correcting the problem or no "reasonable time for improvement" was allowed. The efforts of the principal are prerequisites to the termination process. Although these duties place further burdens and paperwork on the principal, the demands force the administration to construct a personnel file which can more readily confirm removal if non-renewal or dismissal is required. The administration also has proof to confront the teacher's argument that she was never informed during the year that her conduct was lacking.

When a board receives a recommendation from a superintendent that a teacher be dismissed or non-renewed, they should inquire as to whether the principal has performed his procedures in the renewal process.

The termination proceedings now move from the principal to the

superintendent. When the dismissal of a teacher is, in the superintendent's opinion, necessary, he may suspend the teacher with pay and without notice or hearing if the teacher's offense is so serious that suspension is needed for the "best interests of the children of the district." However, the superintendent must initiate hearing procedures to dismiss the teacher. This process must begin within ten days of the suspension.

When the superintendent believes that the dismissal or non-renewal of a teacher is required, he must make a written recommendation of termination to the board. If a tenured teacher is involved, the recommendation must include one or more of the statutory grounds needed for removal. A statutory cause is needed for either the dismissal or non-renewal of a tenured teacher. The board can accept or reject the superintendent's recommendation. If accepted, the board must make sure that every board member's vote is individually recorded in open meeting. Otherwise, the Supreme Court has ruled, the voting is defective. Notice of the board's decision to accept the superintendent's recommendation must be sent to the teacher by certified mail with return receipt requested. For non-renewal, notice must be sent by certified mail restricted delivery prior to April 10th. The notice informs the teacher that the teaching contract will not be extended to that teacher for the coming school year for the reason that the teacher has committed one or more of the statutory causes for termination. The ground(s) must be specifically stated in the notice. Although the law does not require more, some courts have held due process requires more specificity. Therefore, a very brief description of the facts underlying the statutory charge should be provided. The notice also informs the teacher of the right to contest the non-renewal before a hearing panel and this request must be submitted to the board clerk within 10 days from the receipt of the notice. For the dismissal of a tenured teacher the April 10th deadline does not apply since the contract is to be immediately terminated. The notice must name the statutory ground for dismissal and inform the teacher of a right to be heard before a hearing panel if so requested within 10 days of receipt of the notice.

The statute states that for non-tenured teacher the employee shall be notified of a right to a hearing before the board rather than before a hearing panel. The statute does not require a statutory ground as the reason for removal. Under prior law, the dismissal of a non-tenured teacher required such a cause. The new law does not. Thus, something less than a statutory ground will suffice. The written recommendation by the superintendent in most instances will contain the evaluation deficiencies and the failure to correct these faults as the basis for the termination of the non-tenured teacher. A statutory ground, if listed on the notice as the cause of removal, will have to be proved even though the teacher is not tenured. Thus, such causes should be avoided. The non-tenured teacher is notified of removal and the opportunity of a hearing before the board of education if such a request is made within 10 days of receipt of the notice. At such a hearing, the

superintendent should rest upon the written recommendation he has made to the board, together with documents, such as evaluations, which demonstrate the teacher's problem areas. The law entitles the teacher to a "due process" hearing. "Due process" is a vague term that stands for fundamental fairness. Fairness would include the right of the teacher to be represented by counsel, present evidence to refute the recommendation for removal and make any statement to the board to try to convince them for reconsideration. The State Board of Education has published guidelines for these hearings. Any additional rights will have to be determined by the courts.

If a tenured teacher notifies the board clerk of a desire to be heard before a panel, the clerk shall inform the State Superintendent of Public Instruction that the request has been made. This official, within 10 days of such notice, shall send to the clerk a list of 21 individuals on the hearing judge list. The list is chosen from 200 Oklahoma trial attorneys selected by the Oklahoma Bar Association. The 21 sent to the local board shall represent at least three geographic areas of the state. These areas are now defined as the state's judicial districts for district attorney elections. The teacher also receives this list of 21 and if the board and the teacher cannot agree on a judge an elimination process begins whereby the teacher strikes one name and the board makes the next elimination and so on until one name remains. This individual becomes the judge by default. The judge is notified of his selection and must schedule a hearing within 20 days of that notice. The judge tells the teacher and board of the time and place of a hearing. The hearing can be conducted in the school district involved, the county seat of the district or any location mutually agreed upon. The judge also employs a reporter who will make a transcript of the hearing. The judge is joined by one person chosen by the board and one by the teacher. These three form the hearing panel.

The act provides that the superintendent "or his designee" shall represent the board at the meeting. The superintendent and the teacher have the right to counsel, present testimony and offer affidavits or depositions. At least 5 days before the hearing each party must furnish to the opposition the names of all witnesses to be called.

The hearing judge is granted power to administer oaths, issue subpoenas for attendance and the production of documents, receive evidence, call witnesses and preside over all motions. Evidentiary rules are governed by Oklahoma's Administrative Procedures Act. The superintendent or his designee has the burden of proof at the hearing and must prove the statutory cause by a preponderance of the evidence. The State Board of Education will develop uniform procedures to be applied at the hearings.

The hearing panel members are compensated in amounts determined by the State Board guidelines, which are available to districts in a booklet form. The teacher and the board divide the bill for "expenses and cost of the hearing and the official transcript, excluding attorney fees of the parties involved."

Within 30 days from the time a hearing judge is chosen the panel

shall complete the hearing, prepare a written report and conclusions of law and direct that either the local board's decision be sustained or the teacher reinstated. The panel decision is final and can only be appealed on the basis of the written record to district court. Thus, if the teacher appeals the superintendent does not have to prove the case again before the court. The judge reads the written transcript and according to case law, will uphold the decision of the panel unless the decision was clearly erroneous or the procedural provisions of the statute were violated.

For dependent districts the County Superintendent acts in the same capacity as the superintendent of an independent district. Therefore county superintendents receive recommendations from the principal, send removal recommendations to the local board and present the board's evidence at the hearings.

The removal statute does not apply to substitute teachers, adult education teacher, teachers employed on "temporary contracts," county superintendents and teachers in positions fully funded by a federal or private grant. By excluding substitute teachers from the removal process the law allows them to be summarily removed without going through the regular removal process. Because "temporary contracts" are allowed, the board can now contract with substitutes on a temporary basis and in such contracts state that the temporary employee does not have the benefits of the continuing contract law and the removal procedures.

STATUTORY GROUNDS FOR REMOVAL

In Oklahoma, grounds justifying the removal of a tenured teacher include:

1. Incompetency,
2. Wilful neglect of duty,
3. Immorality,
4. Moral turpitude,
5. Cruelty, and,
6. Teaching disloyalty to the American Constitutional system of government.

Because incompetency and wilful neglect often apply in the same fact situations, these grounds will be discussed under the same heading. Also, immorality and moral turpitude will be combined into one unit discussion. Teaching disloyalty, which is never used as a statutory cause, will not be commented upon.

A. INCOMPETENCY AND WILFUL NEGLECT OF DUTY

INTRODUCTION

Incompetency and wilful neglect of duty are not synonymous in that wilful neglect means the teacher has intentionally decided not to perform some duty that the teacher was aware of while incompetency

can include a lesser degree of inadequacy which is similar to negligence. However, there are numerous situations in which the action of a teacher could be termed both incompetency and wilful neglect of duty. What exactly do the terms "incompetency" and "wilful neglect of duty" mean?

STATE DECISIONS

In Oklahoma, the meaning of incompetency can be gleaned from the decisions of the State Board of Education and the Professional Practice Commission, which formerly heard appeals from the decisions of local boards. It is not clear how many acts of incompetency must be committed per teacher to warrant removal since several deficiencies are usually found in the opinion of a single case. Acts which have been found to constitute incompetency include the teacher:

1. Failing to exercise proper self-control and courtesy in dealing with teachers and personnel in the school district;
2. Criticizing professional personnel in the presence of students;
3. Failing to properly advise parents of the progress of their children;
4. Unduly absenting himself from the school grounds for personal reasons;
5. Failing to deal with parents and school personnel in a respectful manner;[10]
6. Failing to maintain proper order and discipline in the classroom;
7. Failing to keep proper attention of the students;
8. Failing in typewriting class to develop proper posture and mechanical skills of the students;[11] and,
9. Failing to sufficiently impart to her students knowledge of the subject matter.[12]

Wilful neglect of duty has been found by the State Board of Education and the Professional Practices Commission to be present when the teacher:

1. Would not turn in work orders;
2. Used a school motor vehicle without proper authorization;
3. Allowed students under his supervision to be in the student lounge during class time and go into other classes which were in session;
4. Could not account for the presence of students;
5. Refused to accept supervision from his superiors;[13]
6. Failed to sign in when he arrived at school;
7. Was absent from assigned duties without authorization;
8. Left his class unsupervised;
9. Failed to deliver to the principal, as he was instructed to do, a textbook requisition;
10. Smoked cigarettes while students were under his control;[14]
11. Instructed the football team to execute an illegal play in a regular season game; and,
12. Violated board policy prohibiting the use of profanity by

teachers in that he used profane language at football team members during halftime and games.[15]

CASE LAW

Recently reported decisions in other states help define what is included in the statutory grounds listed for teacher removal.

1. ABSENCE WITHOUT PERMISSION

The area of unexcused absence frequently arises in regard to grounds of willful neglect of duty and "insubordination," a charge which can encompass both wilful neglect and incompetency grounds. In one decision the court held the absence of just one day was sufficient for removal. A teacher's aide had been appointed an election clerk by the county election committee. The aide informed the superintendent that she would not be in school on the day of an election so that she could fulfill her clerk duties. The superintendent told the aide that the board did not approve of her being off that day. The aide went electioneering anyway and the board non-renewed her contract for that reason. The Court upheld the board's action.[16]

In another case a principal was absent for five days without permission. During the last week of the school year in June, two weeks after classwork had been completed, the principal did not arrive at work, having traveled to another town to enroll in a summer college course. The superintendent testified that the principal did not ask permission for the leave. In upholding the charge of wilful neglect, the Court stated:

> Although the evidence does not show any real or serious harm was caused by the plaintiff's absence for the week in question and though his dismissal under the circumstances could be termed harsh, we nevertheless are of the opinion such a dereliction is sufficient to authorize the board to exercise its discretion to terminate the employment.[17]

In Maine, a teacher wrote the superintendent that she would be gone from March 26-31 on a trip to Jamaica with her husband on a tour sponsored by the Grand Lodge. The superintendent wrote the teacher and stated the leave requested had not been approved. The teacher went ahead to the Caribbean and on March 27 she was sent a notice of dismissal. The Court sustained the dismissal and stated the "School Committee was entitled to conclude the plaintiff's usefulness in the school had become impaired and that the good of the school required her dismissal."[18]

Some courts have not looked kindly on teachers who call in sick when they are not really ill. A teacher asked for personal business leave on February 26, 27 and 28 so that she could sell her "ailing father's house." On February 24th someone called in to the school for the teacher and stated she would be absent two days on account of sickness. That day the teacher traveled to New England so that she

could spend an enjoyable week skiing with one of her students. The Court found the facts constituted wilful neglect of duty.[19]

In a similar decision a teacher called in sick and stated she had the flu. Thirty minutes later the teacher was on her way to Las Vegas with her husband for a convention. The teacher had 38 sick leave days to her credit but board policy had established that sick leave was to be used for actual illness. The policy did not require the presentation of a doctor's statement. The Court concluded "probably the most influential factor in the board's decision was plaintiff's attempt to deceive them as to the reason for her absence. School districts have a right to demand more forthright conduct from heir professional employees."[20]

Another Court placed heavy emphasis on the taking of sick leave for purposes other than illness. A teacher was absent seven days without permission and had falsely certified in writing that he was ill on seven different occasions. He thus received sick pay for days off when he in fact was not sick. According to the judge "such irresponsibility makes it impossible to conclude that the discipline imposed is shockingly disproportionate to the offense."[21]

Non-classroom Absences

Dismissals have been upheld because the teacher was absent from functions other than classroom teaching. Although a teacher was told by the superintendent to attend open house the teacher replied that she would not attend, and indeed she failed to appear. The Court, after stating open house was a "significant part of the school program," used strong language in upholding the "insubordination" charge:

> The refusal, without cause, of a new teacher to participate in this program sets a bad example for the students, is an annoyance to the faithful teachers who always participate, is embarrassing to the school officials who are called upon to explain her absence, and disappointing, if not outright disgusting, to the parents and relatives who have made personal sacrifices to be there. Any school teacher who lacks an understanding of her responsibility to the be present on this occasion and who arrogantly refuses to obey the direction of her employer to be there and instead follows her own personal whims and pleasures can properly be held by the board employing her to be unfit to continue in the employment of that bord.[22]

Another teacher had signed a supplemental contract to supervise the band during football and basketball games. The teacher missed one football game and one basketball game while showing a lack of supervision over the band in other athletic contests. In addition, the superintendent's evaluation of the teacher stressed greater supervision over the band was needed. The Court upheld the board's decision that the absences and failure to properly supervise the students amounted to incompetence.[23]

A physical education teacher requested leave to attend an Illinois School Problems Committee hearing which would be conducted in another town. The board refused leave because the seminar was not

connected to physical education and no substitute could be found for the teacher. The instructor left in spite of board disapproval and the Court upheld his dismissal.[24]

2. CORPORAL PUNISHMENT

Wilful neglect of duty occurs when a known school policy is not followed. Several cases have concerned the failure to follow corporal punishment procedures. For example, one board had a written policy stating corporal punishment should be used only as discipline of a last resort, that it should be administered by the principal and witnessed by another adult, and that the punishment should be reasonable in nature. Nevertheless, the teacher struck one student in the face, slapped three students on their shoulders and heads and hit one pupil on his seat. After each incident the principal reminded the teacher of the board's punishment policy. The Court easily concluded the teacher's disregard of the policy constituted wilful neglect of duty.[25]

3. GENERAL INCOMPETENCY CHARGES

Case law has also listed grounds that have been determined by judges to amount to "incompetency." One teacher was found to be incompetent because:

1. Her lessons were not taught in accordance with her work plans;
2. Her classroom time was poorly budgeted;
3. Her presentation of lessons was confused;
4. She would not adjust her teaching methods as requested by the superintendent, and,
5. She was reluctant to accept criticism from the administrative personnel.[26]

Another teacher was determined to be incompetent in her profession because:

1. 62 students signed a petition addressed to the superintendent stating that they were not learning anything in her class;
2. Numerous complaints were made by the students about her teaching performance;
3. Meetings with the superintendent failed to correct the problems she was having in the classroom;
4. After a parent complained to the principal about the teacher the instructor refused to help that parent's child with his classwork and derided him in class;
5. The teacher embarrassed students with "comments with sexual connotations;"
6. The teacher failed to complete a lesson plan book; and,
7. The teacher refused to answer the students' questions or explain ambiguous textbook material.[27]

Incompetency was upheld when the board showed the teacher:

1. Was a half hour to an hour late for work three times during the first four weeks of school;

2. Was so lax in maintaining discipline over her students that the principal was forced to quell classroom disturbances five times during the year;

3. Left the class unattended and while she was gone a fight erupted between two students;

4. Allowed paper airplanes to be thrown out of the classroom window;

5. Jerked a girl from her desk and angrily shoved her into the principal's office;

6. Failed 45% of the students; and,

7. Received a below average evaluation by the administration.[28]

Charges were upheld against a teacher because:

1. Loud noises coming from her classroom were heard in other parts of the school and disturbed those classes; and,

2. Her arbitrary grading policies were not satisfactorily explained to the superintendent.[29]

In another decision the court found the following facts constituted professional incompetency:

1. Parents complained that the teacher was insensitive towards the needs of students who were not "average";

2. The teacher was reluctant to accept new teaching methods;

3. The teacher showed insensitivity towards the feelings of her students as revealed by her not providing confidentiality to their discussions: the teacher relayed the content of her private discussions with her students to others; and,

4. The teacher displayed a "lack of energy" in the performance of her duties by failing to move around the classroom and provide individual attention to the students.[30]

Another decision listed several reasons for upholding the charge of incompetency:

1. The corporal punishment policy of the school was violated when the teacher, without another teacher present, slapped a student and pulled the hair of another pupil;

2. The teacher allowed students in her study hall to play checkers, chess and card games;

3. The teacher used "damn" and "hell" in her instruction and conversation with the students;

4. The teacher called a student a "whore"; and,

5. The teacher allowed two students to fight in her presence and did not attempt to stop the conflict.[31]

Reasons vital to the board's incompetency case included:

1. Refusal to attend faculty in-service programs;

2. Leaving the class outside the principal's office without supervision;

3. Failure to designate which of her students had speech defects so that they would be able to participate in a special program;

4. Refusal to follow the principal's suggestions for improving her teaching abilities; and,

5. The use of foul language when speaking to the principal and the administrative staff.[32]

4. PROFANITY

The use of profanity by a teacher has been used by some boards both under the "incompetency" and "immorality" grounds for removal. Boards have encountered some problems under the immorality charge because some courts have required the board to prove the words used were considered to be immoral by the community at large. This standard requires numerous witnesses who must establish what "moral" speech is in the school district community. For example, although the court found the use of "damn" and "hell" in a teacher's classroom instruction and private conversation with students to be incompetent actions, the court held the language used had not been proved to be immoral in the community.[33]

Profanity has been a source of incompetency cases. One of the elements in establishing the unfitness of a teacher included the teacher writing, in reference to her principal, the following message on her black board: "no son of a bitch that sits on her ass all day long, has a soft, easy job is going to check my room out."[34]

In addition, a teacher was held to be incompetent for using such words as "dummies, damn babies, stupid, bastards, bitch, hell" and other language in the gutter variety while teaching his class.[35]

5. SEVERITY OF THE PUNISHMENT

Even though a teacher may not have acted according to professional standards a teacher may raise the issue that the offense does not warrant punishment as severe as removal from the district's employment. In one case a teacher, who moonshined as a gunsmith, unintentionally brought a gun and ammuniton to school in his jacket pocket. On discovering the gun the teacher decided to keep the weapon in his classroom rather than in his car because his car door lock did not work and he was afraid someone would steal the gun from his automobile. Instead, someone took the gun out of his jacket as it hung in the class. Although the court decided the action of the teacher showed a "grave lack of judgment," the judge did not feel the conduct was such a moral impropriety or act of professional incompetence to justify the removal of an instructor with 12 years of teaching experience in the district.[36]

6. CONDUCT OUTSIDE OF SCHOOL

Conduct amounting to incompetency does not necessarily have to occur inside the school building. For example, in a bizarre case a teacher fell in love with a mannequin. The teacher was observed by a neighbor, a policeman and the school superintendent as he would carry, dress, undress, and lewdly examine the female mannequin in his front yard. The teacher was dismissed on the ground of "conduct

unbecoming a teacher." The teacher sued the board on the allegation that the removal violated his constitutional rights. The court held the board had acted reasonably.[37]

The commission of a crime outside of the school grounds has also been used as evidence of "unbecoming conduct," which is a charge similar to "incompetency." Violation of the law also runs into the field of "immorality" and "moral turpitude." But in some cases crime has also been included in an "incompetency" charge. For example, a policeman witnessed a teacher stealing a bicycle and chased him as the instructor fled from certain arrest. The teacher was arrested for theft, assault and battery, and fleeing a police officer. He pled guilty to the last two charges. The teacher contended that a misdemeanor violation was not sufficient cause for his dismissal. The judge did not agree: "it cannot be said that a teacher's conduct outside the classroom bears no reasonable relation to his qualifications for employement."[38]

In another case, a teacher of 17 years experience was arrested for three separate shoplifting incidents and had a reputation as a shoplifter in the community. The court held that "such behavior, although not directly connected with his work as a guidance counsellor, clearly could be found to be conduct unbecoming a teacher."[39]

B. IMMORALITY AND MORAL TURPITUDE

1. HOMOSEXUALITY

Since immoral conduct rarely happens in public view, especially by teachers inside the school building, a problem occurring with the immorality charge is whether the out-of-school private conduct relates to teaching effectiveness. Recent cases have struggled with the issue of whether a teacher's homosexuality is a cause for removal under the immorality charge. For example, in one case a teacher admitted to his principal that he was a homosexual. The district, based upon that confession, decided to non-renew his contract. The teacher challenged his dismissal in court, contending that his condition had not impaired his fitness to teach. Although the court ultimately ruled for the board, the court believed his life style standing alone would not warrant removal:

> Immorality as a ground of teacher discharge would be unconstitutionally vague if not coupled with resulting actual or prospective adverse performance as a teacher. It follows the term "immorality" is not to be construed in its abstract sense apart from its effect upon teaching efficiency or fitness to teach.

First, the court determined the homosexuality of the teacher was "immoral" because such conduct was considered to be by society; homosexual acts violated state laws; and the condition was not a disease but a matter of choice. The teacher had sought no change in his condition and thus had to accept the consequences that his behavior was immoral.

Second, did the immoral conduct impair the teaching efficiency of this veteran of 12 years who had always received favorable evaluations? The court quoted with approval from the decision rendered by the lower trial court:

> A teacher's efficiency is determined by his relationship with students, their parents, fellow teachers and school administrators. In all of these areas the continued employment of appellant after he became known as a homosexual would result, had he not been discharged, in confusion, suspicion, fear, expressed parental concern and pressure upon the administration from students, parents, and fellow teachers, all of which would impair appellant's efficiency as a teacher and injure the school.

The teacher contended that his homosexuality only became known to the community as a result of the board's action. Thus, he was not responsible for any adverse effects that his now known sexual persuasion might have on his students. The court, however, stated that the teacher assumed the risk of public disclosure by engaging in such conduct.

In regard to the teacher's effectiveness, the principal stated his presence on the faculty would create problems and some teachers testified they found his conduct objectionable. The court added that if the teacher were not removed the students would treat his retention as a sign of adult approval of his conduct. The judges felt that a school district does not have to "wait for specific overt expression of homosexual conduct" before they act to prevent harm. Thus, even though the court held immoral conduct must be related to the classroom for termination, the court ruled homosexuality in itself relates to the classroom since keeping a homosexual on the faculty would be a stamp of approval on such a life style and would directly influence the children of the district.

A dissent was written which insisted that the teacher had just admitted to homosexuality and no homosexual acts had ever been proved to have occurred. The dissenting judge reasoned that to remove the teacher because of his mere admission was like removing an unmarried male teacher who admitted he was attracted to women because he must therefore be guilty of immorality.[40] In 1977, the United States Supreme Court refused to hear the teacher's appeal. Thus, the state decision terminating the teacher stands.

Perhaps the most controversial decision in regard to teacher homosexuality occurred in California in which a male teacher engaged in non-criminal homosexual acts with another male in the teacher's apartment on four occasions. The court held this evidence alone was not sufficient for removal. The conduct must relate to job performance. Just because homosexuality is considered immoral does not justify removal. The court remarked that to many "laziness, gluttony, vanity, selfishness, avarice and cowardice" also constitute "immoral conduct" and such character defects should also lead to the removal of personnel. The court ruled that there was no evidence shown at the board meeting which would show that the teacher would engage in "any

untoward conduct" with a student, would publicly advocate the use of improper conduct or would not be able to effectively deal with teacher-student relationships.[41]

This decision has been distinguished by later California courts because of different facts in the cases before them. For instance, in a public restroom a teacher lewdly exposed his private parts to another and solicited a male for homosexual activities. The judge held these public violations of the state's penal code were different from the non-criminal homosexual acts performed in a private home as concerned the court in the *Morrison* decision. The judge held the very nature of the act demonstrated the teacher was unfit to teach in the public schools. Also, the court stated the board of education, in such a circumstance, would not have to prove the teacher was a threat to other teachers or to students because since the state had made the actions of the teacher a crime, the state government had established a policy that anyone committing the crime was a threat to children. The court also stated that it was unnecessary for an expert to testify for the administration at the board hearing in regard to the teacher's impaired instructional abilities because the "defendant's actions speak louder than any words of a psychiatrist."[42]

The term "immorality" is difficult to define. For years the courts have struggled to determine what "obscenity" means, and the word "immorality" presents just as troublesome explanations. In one court case, a teacher acknowledge to the board of education that she was a practicing homosexual. After her termination, she sued the board in federal court by alleging she had been deprived of her constitutional right of due process. She won. The court held the term "immorality" was an unconstitutionally vague standard under which she was removed.[43]

In another decision, the judge decided the mere knowledge of a teacher's homosexuality is not grounds for dismissal by a board of education. However, the court refused to grant the teacher's request for an injunction that would have restrained the board from transferring the teacher from a classroom teaching position to a non-teaching position. After the transfer, the teacher appeared on television and radio programs to complain about the board's actions. The court determined such conduct was not secured by constitutional free speech protection and also had incited danger to the district's educational process.[44]

One state's law required the board to insure that all teachers passed physical examinations. The statute also allowed for psychiatric testing. The board required a homosexual teacher to submit to mental tests, which the teacher refused to do. The court believed the required testing did not infringe upon any of the teacher's constitutional protections and that the board's requirement was reasonable in view of the opinion of psychiatrists that the teacher's support of gay rights was a display of abnormal mental health which might affect the ability to teach, discipline and associate with students.[45]

2. SEXUAL RELATIONS WITH STUDENTS

One night in California a policeman discovered a teacher in a parked car. The teacher's pants were unzipped and lowered from the waist while his female student companion was naked from the waist up with her pants unzipped and open. The junior college teacher attempted to flee from the policeman. The resulting car chase reached speeds of up to 100 miles per hour before the teacher was subdued. The court ruled the sexual relationship between the instructor and the student in itself demonstrated that the teacher was unfit to teach.[46]

Other recent cases have concerned sexual relationships between teachers and students. Boards of education have not experienced difficulty in making terminations hold up under appellate review when such circumstances have been involved. For instance, while on vacation, a teacher parked his camper next to a family that had school children in his school district. One of the children, an 8 year old girl, slept in the camper one night and awoke to find the teacher touching her private parts. The termination for this conduct was upheld.[47]

A teacher obtained permission from the parents of a student to date their daughter. Later, a school counselor learned that the girl was pregnant and in response to this information the teacher admitted to the principal that he was the father of the expected child. In affirming dismissal on the grounds of sexual relations with a minor student, the court stated "it is difficult to conceive of circumstances which would more clearly justify the action of the school board than the sexual misconduct of a teacher with a minor student in the district."[48] The court had little trouble in upholding the termination of a male teacher who plead guilty to taking indecent liberties with a minor male student.[49]

One case granted termination for sexual relations with a former student. Two months after she graduated, an 18 year old and her former counselor spent the night at the girl's residence. The termination was upheld on the grounds that the incident "conceivably could so upset the community as to undermine the confidence of students and parents of students who now seek plaintiff's guidance."[50]

3. SEXUAL RELATIONS WITH OTHER ADULTS

Immorality as a charge for teacher termination has also concerned the sexual affairs of single teachers with members of the opposite sex. A single teacher allowed the 27 year old friend of her son to stay in her apartment for periods of up to one week. A witness who visited the teacher one morning after she had apparently just arose saw this man emerge from the bedroom. Based upon this evidence, the board terminated her contact. The court found such evidence was deficient. There was "no proof of impropriety which affected her classroom performance, her relationship with students under her care, or otherwise had any interest possessed by the board of education. At most, the evidence may be said to raise a question of Mrs. Fisher's good judgment in her personal affairs, when measured against an undefined standard which someone would suppose exists in a small town in Nebraska."[51]

A teacher lived with a man in her trailer home, a fact known by students and parents. Several parents protested to the superintendent about this living arrangement. Although the board at first charged her with immorality and incompetency, the board amended the charge to only include incompetency. The court found this conduct was not a proper example for the students, that some parents did not want her to continue to teach their children and that knowledge of the conduct was likely to cause discipline problems and affect her teaching ability.[52]

In one case an administrator's love affair did directly interfere with his duties because he met with the woman three to four times a week during working hours. Both the administrator and the woman were married. In addition to these daytime meetings, the woman accompanied the administrator to school conventions where the administrator promptly registered and then did not participate in any of the programs. The court found this interference with his job performance and attendance at professional meetings constituted wilful neglect of duty. The board had also based the termination on "immorality" since the administrator had admitted having a sexual relationship with the woman. The court pointed out that this charge, which was based only on the adulterous relationship, was not connected in itself to school performance. The judge indicated this charge alone would not have justified removal. Since neglect of duty had already been demonstrated, the court refrained from discussing the immorality ground for removal.[53]

4. COMMISSION OF A CRIME

As mentioned in the section concerning incompetency, the commission of a crime can be grounds for removal. In one situation, a teacher who had been elected to the county legislature was on a leave of absence from school during the time of his office. During that period he was convicted of the crime of promoting bribery of a public official. After he served time in prison he sought to return to his teaching position but the state revoked his certificate. The court held "a teacher is fairly charged with the knowledge that conduct which will subject him or her to five years in prison . . . will also subject that teacher to review concerning fitness to teach."[54]

"Moral turpitude" is sometimes used in place of "immorality" in teacher terminations. A teacher in California found a marijuana plant while he was on a walk. He carried the plant home and nourished it. Although his horticultural efforts were successful, he was convicted of the felony of cultivating marijuana. The board dismissed him for committing an act of moral turpitude. The court held that the felony conviction was not in itself "moral turpitude" as a matter of law. Defining moral turpitude as "an act of baseness, vileness, or depravity . . . contrary to accepted and customary rule of right and duty between man and man," the court declared that measured by today's moral standards the cultivation of a marijuana plant did not as a matter of law fit into the definition of moral turpitude. Also, as a matter of law, the conviction did not have an adverse affect on the school. The court

emphasized that the offense did not involve a student and did not occur in public or on school property.[55]

A teacher killed her husband with a gun and the State Board proceeded to revoke her certificate on the grounds that she had "entered a plea of guilty to a felony, to wit: Manslaughter." The court decided "her plea of guilty is prima facia evidence" of "moral turpitude." Also, no evidence was submitted which significantly mitigated the turpitude of the acknowledged offense. *Kiner v. State Board of Education*, 344 So.2d 656 (App. Fla. 1977).

In 1977, the Oklahoma Supreme Court, in a case involving the denial of a license to operate as a private detective, provided a definition of moral turpitude. The city denied the plaintiff a license based on a Tulsa ordinance which stated a license would not be granted to anyone convicted of a felony or a misdemeanor involving "moral turpitude." The city found such conduct present in the plaintiff's plea of guilty to a charge of public drunkenness and his arrest for being absent without leave from military service. The Court held:

> Moral turpitude broadly defined is any conduct contrary to justice, honesty, and good morals. Moral turpitude implies something immoral in itself regardless of whether it is punishable by law. The doing of the act itself, and not its prohibition by statute determines the moral turpitude. The elements of intent and knowledge are regarded as important, and if the wrong is unintentional or if the act is made improper by statute without regard to the mental element, it is not moral turpitude.

Also, in holding that moral turpitude is not represented by public drunkenness, the court noted the offense was not one which "signifies an inherent quality of baseness, vileness and depravity denoting moral turpitude."

As to the plaintiff's military absence, the court noted he left his military base "because he had wanted to be present when his first child was born." In addition, the "record reflects no court martial proceedings were instituted against appellant; no conviction following appellant's arrest; nor that the discharge was issued as the result of an offense involving moral turpitude." *Kelley v. City of Tulsa*, 569 P.2d 455 (Okl. 1977).

5. SINGLE PARENT OF ILLEGITIMATE CHILD

Several districts have attempted to form policies prohibiting the employment of parents of illegitimate children. When one board learned that a teacher's aide was the mother of a child born out of wedlock the board decided to terminate her because school policy prohibited such employment. A federal district judge held the aide's constitutional right to equal protection of the law was violated by the termination since the policy as written only applied to unwed mothers and not to unwed fathers. Also, due process was found to have been denied to the aide because there was no rational relationship between the policy and the furthering of educational objectives. The circuit

court affirmed the district court's ruling. The school justified the policy on the argument that the fact one was an unwed mother was prima facie proof of immorality. The court, however, held due process forbids the school from adopting a policy that reaches such an irrebutable presumption. The presumption being that the presumed fact, immorality, necessarily follows the proven fact, being an unwed mother. The court held this presumption was not always true. The district court found such a policy did not consider several important factors, such as the later marriage by the mother to the father, the time that had passed since the birth of the child, and the teacher's good character in the community. In addition, the policy would not allow "compassion for pregnancy through force, deceptive designs or through drugs or alcohol." In summary, the policy did not give consideration to the "multitudinous circumstances under which illegitimate childbirth may occur." What the policy did do, the court reasoned, was to encourage abortion, an issue also opposed by many on moral grounds.

The district also contended that keeping the unwed parent in employment set a bad example for the children in the school. The court discounted this reasoning because in this particular case there was no evidence of the aide "proslytizing pupils", and, since the aide lived with her parents, brothers and sisters, the students could not have learned of her motherhood just through her living conditions. The district also argued that keeping the aide in employment would contribute to the pregnancy of school girls. The court stated such an argument was without factual support.[56]

Another school district lost a case involving an unwed parent policy. A teacher who had just been married for one month was 8 and a half months pregnant. She was dismissed on immorality grounds. The court found there was no evidence of injury to students, the faculty or the school; that no parents had complained of her condition; that no students had protested about her continuance as a teacher; that there was no evidence offered by the board to reveal her relationship with other teachers had deteriorated; and, there was no evidence showing her teaching abilities had been adversely affected. The court concluded that immorality is a "sufficient cause only where the record shows harm to pupils, faculty or the school itself."[57]

6. PROFANITY

The use of obscene language has also been included in "immorality" termination charges. A teacher wrote two letters to a former student which contained vulgar language. The student's mother discovered the letters and presented them to the superintendent. The court ruled that private speech which was not "in any way inimical to that welfare" of the school community is absolutely immaterial in applying the immorality standard. Even though the letters might be immoral in the abstract they were not immoral for dismissal when there was no evidence that the letters adversely affected the school's welfare. Although the letters were disclosed to the public and thus tarnished the reputation of the teacher, the disclosure did not relate to the conduct of

a teacher but to others. The judge stated "the private conduct of a man, who is also a teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher . . . ."[58]

A teacher wrote a filthy word on the black board while attempting to demonstrate to his class that words which might be taboo in one society might be meaningless in another. The court found the writing did not disturb the class, was relevant to an educational discussion and was a word contained in books in the school library. The court felt the teacher could only be removed if he did so after a school regulation had instructed him not to use that method of teaching.[59]

7. PUBLICATIONS AND SPEECH

Termination of a teacher's contract for things the teacher has said in school often leads to court action whereby the discharged employee alleges the contract was terminated because the board was retaliating against the teacher for exercising her constitutional right of free speech. Although the United States Supreme Court has ruled First Amendment rights apply in the classroom, those rights are limited to some extent because of the "special characteristics of the school environment."

In such a situation, the courts balance the right of a student or teacher to speak freely with the right of the government to control an orderly public educational system. The court held that in order to out-balance the speech rights of students school officials must show that the exercise of the right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[60] Courts have also used this test when ruling on the free speech of teachers. Important in the cases is the age and maturity of the students subjected to the language, the relevancy of the speech to the educational function of the school and the effect the utterance had on maintaining school discipline.

In one case, a teacher instructed the students to read an article in *Atlantic Monthly* which concerned youth revolution and protest. The writing made repeated references to an obscene word. The teacher was dismissed for explaining the meaning of this word to the students and discussing its use in the article. The court, however, concluded that although the offensive word was repeated numerously it was important to the article's theme and did not produce too great a shock for the high school audience.[61]

Another teacher was dismissed after he read to his class a short story which he had written. The story contained a great deal of vulgar language. In looking at the facts present in this particular case, the court held the teacher had "substantially transcended any legitimate professional purpose and was without the pale of academic freedom."[62]

C. CRUELTY

Several recent decisions have discussed evidence which a board of education and the courts have felt amounted to the statutory charge of "cruelty." For instance, one teacher had a particular propensity in using physical force against his students in that he:

1. Struck students on the ear;
2. Wrestled them to the ground;
3. Propelled them into walls and against furniture;
4. Shook them;
5. Engaged in a form of horse play called "red belly" whereby the teacher exposed the stomach of the student-victim and then rubbed or slapped the abdomen to make the tummy red; and,
6. Used verbal abuse against students.[63]

The last factor listed above reveals that cruelty towards a student can be accomplished without physical contact. Particularly in regard to younger children, more harm might be inflicted against a student by means of a teacher's tongue than by his hands or paddle.

In one decision the evidence revealed that "the Appellant grabbed Donald by the shoulders, shook him, then pushed him into the blackboard causing Donald to hit his head. Donald fell to the floor. The Appellant grabbed Donald by his hair and arm and lifted him to his feet. Appellant than pushed Donald into the bookcase. Donald hit his head again and fell to the floor." Even though the teacher had been employed in the district for 16 years the opinion stated "a single incident of sufficient severity may justify a charge of cruelty against a teacher with a long and unsullied record of service."[64] Such language tends to indicate that cruelty will be more likely to cancel out a teacher's plea for leniency becaause of a previous good record than will the charges of incompetency and wilful neglect of duty.

Also found to be "cruelty" was the following conduct:

1. Slamming a student's head against the wall, shoving him into a chair, and squeezing his throat;
2. Holding a student against the wall; and,
3. Picking a student up from his chair by the back of his neck with the teacher's hand while the other hand was held over the child's mouth.[65]

A teacher who had previously experienced physical problems with his students had been instructed by the administration not to ever touch a student again. Nevertheless, the teacher was shown by the board of education to have:

1. Lifted a child up by his neck;
2. Shoved, pushed and hit students; and,
3. Thrown balls at the stomachs of students.

Even though there was no physical injury to any of the pupils the court determined that this conduct was unreasonable physical force employed by the teacher.[66]

D. STATUTORY GROUNDS OTHER THAN THOSE LISTED IN THE TEACHER REMOVAL STATUTE

In 1973 the Attorney General ruled that "while a teacher with tenure may not be dismissed during the term of an existing contract except upon grounds specified in the contract or statutes, the board of education may legally choose not to renew the contract of a tenured teacher, where the board, in good faith, bases the non-renewal on a loss of attendance, the lack of available funds caused by a reduction in federal funds or a mandatory retirement age."

70 O.S. 18-123 states "teachers may be dismissed if a school district has a loss of average daily attendance over the prior year which would reduce state aid to the extent that such district was unable to finance the contract salaries of teachers employed by school districts under the continuing contract law."

One Oklahoma school district non-renewed twenty-two[67] teachers, seven of whom were tenured, on the basis of loss of attendance. In its Findings of Facts the State Board of Education found:

1. That during the 1974-75 school year and for several years prior thereto the surplus funds of the Crooked Oak School District were gradually dissipating.

2. That the contracts of twenty-two teachers were not renewed for the 1975-76 school year, which included seven tenured teachers.

3. That during the 1974-75 school year the District sustained a loss of 245 pupils in average daily attendance over the prior school year and that said loss of attendance resulted in a reduction in state aid to the District of approximately $80,000.

4. That at the time the Board of Education voted not to extend contracts to twenty-two teachers, including the appellees, the exact loss of attendance and state aid to be sustained was not known . . .

5. That the administration considered, in determining which teachers would not be retained by reason of the District's financial difficulties, three factors: certification, performance and tenure.

6. That the positions of appellees Austin and Burrell were abolished for the 1975-76 school year and no non-tenured teachers were retained in the English Department in which Mr. Greear taught, although a new teacher assumed his coaching duties; and that non-tenured teachers were retained in positions for which each of the appellees were qualified.

7. That in addition to the twenty-two teachers whose contracts were not renewed seven others ceased employment due to resignation or retirement; and, that new teachers without tenure status were hired at the beginning of both the 1974-75 and the 1975-76 school years.

8. That the administration considered in recommending non-renewal of twenty-two contracts a continual decrease in surplus funds and loss of average daily attendance for several years prior to the 1974-75 school year.

9. That the Board of Education acted in good faith in voting, prior to April 10, 1975, not to renew the contracts of twenty-two teachers,

including the appellees, based upon the financial difficulties of the District, including a substantial loss of attendance and dissipation of the District's surplus funds.

The State Board concluded the board had acted in good faith and within the authority recognized in the Attorney General Opinon and 70 O.S. 18-123.[68] The State Board's decision was overruled by a state district court in late 1977 and is now on appeal to the state Supreme Court.

70 O.S. 18-123 does not provide for a hearing for the terminated teacher. When a school district loses state funds as a result of declining attendance, is the discharged teacher entitled to the due process protections afforded in the teacher termination statute? The State Board ruled that the appellate procedures granted to a teacher under the general teacher removal statute applied to terminations based on 70 O.S. 18-123. In that particular case the findings of fact revealed the teacher was non-renewed because the special education program was being eliminated; that the district sustained a loss of ADA over the previous year amounting to five students; that during the 1976-77 school year the district employed 26 teachers while for the 1977-78 year the district also employed 26 teachers; and, when notice of non-renewal was sent to the tenured teacher the district had three non-tenured teachers, all of whom were re-employed. The State Board ruled the district failed to prove its case. "The evidence offered does not sustain a dismissal as authorized by the provisions of 70 O.S. 18-123."[69]

E. SPECIAL OKLAHOMA TERMINATION PROBLEMS

1. NOTICE BY MAIL

State law requires that the board of education notify the teacher by certified mail, restricted delivery, return receipt that the teacher has been either non-renewed or dismissed. What happens if the teacher refuses to accept the board's letter?

A board meeting determined a teacher should not be employed for the coming year. The teacher was not present at the board meeting but his wife was in attendance. The next day, the teacher informed a newspaper reporter that he would take his termination to court. When the postman attempted to deliver the certified notice of a non-renewal the teacher's wife told the postman her husband was asleep and she could not wake him. The mailman left notice with the wife for her husband to call at the post office for the letter. The wife testified she put the notice of the letter on a counter and forgot to tell her husband about it. The notice of non-renewal was returned to the school unclaimed. The court held there was constructive notice which satisfied the procedural demands of the termination statute:

> It is settled that the party to a transaction, whose rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means

of acquiring knowledge which he knows are at hand and thus escape the consequences which would flow from the notice had it been actually received.[70]

In another case, the address used to notify the teacher of nonrenewal was taken from a request for a loan cancellation that had been submitted to the school administrative office rather than from the teacher's address as listed in the personnel directory. The letter was sent on April 8 but was returned by the post office as unclaimed. However, the superintendent notified the teacher orally on April 11th that the notice had been sent to her. The State Board of Education held that the notice complied with the Oklahoma Statute.[71]

2. OPEN MEETINGS

Oklahoma's open meeting law requires that all votes must be cast in open meeting with the vote of each member recorded. The minutes of one school showed "moved and seconded to not renew the contract of Randy Oldham — carried." No roll call was made and no record other than the above minute was made. The Oklahoma Supreme Court ruled the vote was invalid because the statute specifically stated each member's vote was to be publicly recorded.[72]

In another case the board did not take a public vote on the nonrenewal nor record the vote of each member. The State Board of Education ordered the teacher to be reinstated.[73]

A new open meeting law requires that agendas be posted within 24 hours before meetings and that dates time and places of meetings for each calendar year be provided to the county clerk. The statute states that all matters undertaken during meetings which do not comply with the open meeting law are void.[74] Therefore, meetings that fail to abide by the new open meeting statute will not be effective in regard to votes to terminate teachers.

3. RESIGNATIONS

Often, when a board has evidence which inndicates the administration would be able to prove a statutory charge against a teacher, the employee will resign rather than have the accusation against her included in her record. State law requires that resignations be submitted to the board of education by certified mail. This provision is not closely followed and many boards will accept a written resignation from the teacher at a board meeting without an accompanying resignation sent by mail. The mailing requirement has been strictly applied. An oral resignation was submitted to the board in March and a written resignation was presented to the board in April. The board accepted the written resignation the next day. The State Board of Education ruled that the resignation was not effective because the certified mailing requirement of the statute had not been followed. The State Board held: "neither the verbal resignation nor the personal submission of a written resignation were effective, such resignation being required to be submitted by registered or certified mail."[75]

F. FEDERAL COURT ACTION: VIOLATION OF CONSTITUTIONAL RIGHTS IN TEACHER TERMINATIONS

1. INTRODUCTION

A teacher may sue a school district in federal court on the grounds that the contract termination process violated the instructor's rights under the United States Constitution or federal law. For example, the plaintiff may allege her dismissal was voted by the board in retaliation against her for using constitutionally protected rights. Both tenured and non-tenured teachers may claim their liberty rights were abridged although the courts will require that their procedural relief under state law be exhausted before federal relief is requested.

1. COURT PROCEDURES

The most common constitutional right claimed to have been violated is the right of free speech. In 1977, the United States Supreme Court set forth procedural guidelines for such cases. Involved in that decision was a quite vocal teacher. Within a few years of his employment he was elected president of the teacher's association at a time when "tension in relations between the Board and the Association" was growing. The next year, the teacher had an argument with another teacher and slapped him. When an apology was not received, both teachers were suspended for a day. But the suspension was quickly lifted when a number of teachers staged a walk out in protest. The teacher also was involved in an argument with cafeteria workers over the amount of spaghetti served him and made an obscene gesture to girl students who did not obey him when he had cafeteria duty.

The principal circulated a memo to all teachers concerning teacher dress and appearance at school. The teacher quickly gave this memo to a radio disc jockey, who announced it as a new item. The superintendent then recommended the non-renewal of the teacher, who did not have tenure. The notice of non-reemployment stated the reason was for a "notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." Following this statement was a reference to the radio episode and the obscene gesture. The teacher sued the district in federal court, alleging he had been deprived of his job because he had exercised his right to free speech.

The Supreme Court stated it must balance between the teacher's right to comment as a citizen on matters of public concern and the interest of the government as an employer in promoting efficiency among its employees. The Supreme Court agreed that the call to the radio station was a protected First Amendment right. However, the high court questioned whether re-instatement was proper. The Court stated that since the teacher did not have tenure no cause was needed under state law to not renew the teacher's contract. The board could have non-renewed the plaintiff even without the radio incident. The Court compared the facts to criminal law cases. For example, an illegal

confession to a crime does not prevent the introduction into evidence of a later confession if the second was "sufficiently dissipated from the first as to make the second confession voluntary."

With this reasoning as a basis, the Supreme Court then set down procedural guidelines to follow in court when a teacher claims deprivation of a constitutionally protected right in the notice given him for non-renewal. First, the burden is upon the teacher to show that the conduct he alleges has been infringed upon is a constitutionally protected right and was a "motivating factor" in the school board's decision not to rehire him. Next, the district court must determine if the board can show by a preponderance of the evidence that it would have reached the same decision on non-renewal even with the absence of the constitutionally protected conduct by the teacher. Thus, the teacher cannot win her case in federal court if she is unable to show the "motivating factor" behind the termination was retaliation against the teacher for her exercise of constitutional rights.[76]

Even though the teacher may prove that the exercise of a constitutional right was a motivating factor, the court may find that right must give in relation to the interest of the state in promoting a school system operated with order. This standard is called the "balancing test," which was first promulgated by the United States Supreme Court in 1968.[77] In that decision, the court indicated that the government has an interest as an employer which differs from its interests in controlling the speech of the public at large. The interests of the teacher to speak as a citizen about public issues must be balanced against the interests of the state-employer in conducting efficient public schools through government employees. Each case must be examined to determine if the state's interests outweigh the interests of the teacher.

2. THE TEACHER'S RIGHT OF FREE SPEECH

The balancing test is used to decide how far a teacher may go in speaking out on issues. A teacher informed his pupils that the student body was "strong enough" to force the administration to remove ROTC from the school campus. The teacher claimed his dismissal violated his constitutional right of free speech. The court looked to the Supreme Court for guidance and interpreted the high court's decisions to hold:

1. A teacher retains a citizen's right to comment on matters of public concern;
2. Substantially accurate speech cannot be grounds for dismissal absent a showing that the speech disrupted the classroom or the operation of the school; and,
3. Even if the statement were inaccurate, disruption of the school is still needed for removal unless the statements were made recklessly.

In this particular decision the court upheld the findings of the lower court that the statement about ROTC did interfere with the school's educational process; was irrelevant to the teacher's subject area, math, and thus diverted time away from the studies which he

was assigned to teach; and, was made with such anger that the school administration rightly feared potential disruption might occur. The appellate court added that if there were potential disruption to the operation of the school program school officials did not have to wait on termination until the actual disruption began.[78]

A teacher distributed a poem to the class which the teacher had composed and invited class discussion about the topic. The poem glorified the Woodstock festival by speaking of the joys of marijuana and drug use, the use of profane language and vulgar sexual references, and children throwing off the binds of discipline. The court ruled that under these factors the interests of the school outweighed the interests of the teacher to speak freely because the poem was offensive to educational objectives and was not appropriate reading material for the classroom.[79]

In another case a special education teacher informed a student that she had the right to an abortion because she was a ward of the state welfare department. The department, however, on the advice of a psychiatrist, determined an abortion would be detrimental to the girl. But the teacher persisted to talk about an abortion to the girl, her relatives, the psychiatrist and the judge who was in charge of her court custody. The court held the teacher was dismissed because of her activities. But the dismissal resulted from her interference with the relationship between the school and the welfare department and not because of her advice to the student. The court relied on the Supreme Court standards which indicated dismissal was proper when criticism affected discipline by superiors or harmony among co-workers. The court concluded the teacher's activities had created "havoc" with the welfare department and endangered the department's relations with the school board.[80]

Another teacher distributed leaflets prepared by the Revolutionary Youth Movement. The pamphlets accused an administrator of forming a "CIA-style reign of terror," illegally expelling students and using control gas on students at a school where he was formerly a principal. All of the accusations were false and the teacher was removed for these statements and also for distributing the leaflets in the school building in violation of school board policy. In discussing the government's right as an employer to control the speech of employees the court found important factors included the falsity of the statements, the impact of the statements on the students and teachers, the place where the leaflets were distributed and whether the board acted in retaliation against the use of speech or whether it was concerned with the teacher's professional conduct. The court determined the false statements were meant to promote conflict in the school system and required the administration to expend significant amounts of time in explaining to the students and the public that the statements were not true.[81]

When the board was attempting to negotiate with the teachers a new personnel dress code a teacher appeared on a radio show and denounced the board's position. The court ruled the teacher had not

sustained the burden of proof in showing the dismissal was in retaliation against her for her comments because the board members testified they based their decision on discipline problems which had occurred in the teacher's classroom.[82]

A teacher's claim for federal relief was upheld by the court when the teacher was able to show she was removed because of her encouragement to students who wanted to publish an underground newspaper. The court knocked down the insubordination charge because it found the principal's attempts to prohibit the newspaper were unconstitutional. The court emphasized that the record did not reveal any evidence that the teacher's actions with the paper interfered with the normal operation of the school or the teacher's classroom performance.[83]

Another teacher told two school board members the principal was ruining the school. The court held the plaintiff failed to prove the reason for her non-renewal was this conversation.[84] A teacher did prove that speech was the reason for his termination, but the court concluded the speech, in which he called the superintendent a "liar" and an "autocratic administrator," had abused the teacher's constitutional protection and was thus outweighed by the school's interests in running an orderly school system.[85]

A teacher claimed her removal resulted from her political activities against the board and the superintendent. The court found no connection between those activities and removal, but, on the contrary, found she had been derisive of the superintendent and the board and such abusive speech was not able to outweigh the state's interest in preventing such disharmony.[86]

An instructor who spoke at an orientation meeting for new teachers discussed the superintendent's activities in politics, the removal of books from English class plans and the lack of minority faculty members. He also called the superintendent a "villain" and the school district a "snakepit." The court held such an attack upon the administration was proper grounds for removal because such speech was far out-balanced by the need for an orderly school system.[87]

3. ACADEMIC FREEDOM

A civics and political science teacher employed several controversial subjects, such as the Vietnam War and racial conflicts, in classroom discussions. The court found such classroom plans were the basis for the teacher's removal and held that the Constitution allows a teacher to select a teaching method which aides an educational purpose. Therefore, a teacher should not be discharged for using a teaching method not prohibited by any school board regulation.[88]

Two teachers claimed they were removed because they used emotional subjects as part of their class programs. The court, however, determined the employees were dismissed for their teaching inadequacies rather than the subjects they presented. The court did state that community standards could establish First Amendment rights in the field of academic freedom.[89]

4. PRIVACY RIGHTS

A teacher dismissed because she lived with a man not her husband claimed her constitutional privacy rights were violated by the termination charge. The court did not acknowledge that her living arrangement was a protected interest by the Constitution but did state that, assuming the right was protected, the interests of the state outweighed her privacy claim.[90]

5. MARRIAGE

An administrator alleged his dismissal violated his right to marry and maintain his marital interest because the policy of his school prohibited the employment of married couples in administrator and teacher positions in the same school. The court ruled the policy did not violate the right to marry but was a reasonable regulation based upon the assumption that the close marital relationship could interfere with teacher discipline, teacher evaluation and student-teacher disputes that had to be settled by the administrative staff.[91]

FOOTNOTES

1. 70 O.S. 6-101.
2. 70 O.S. 6-101 (E)
3. 70 O.S. 6-102.1, Supp. 1977.
4. *Independent School District No. 10 of Seminole County v. Lollar*, 547 P.2d 1324 (Okl. 1976).
5. 70 O.S. 6-122.1.

6. Opinion No. 76-224.

7. *Martin v. Harrah Independent School District et al.*, Memorandum Opinion.

8. 70 O.S. 6-102.1 through 6-102.3, 6-103.1 through 6-103.14.

9. Opinion No. 77-235.

10. *In the Matter of the Appeal of Eugene Moore*, State Board of Education, August 7, 1975.

11. *In the Matter of the Appeal of Jerry Graybill*, State Board of Education, August 12, 1975.

12. *In the Matter of the Appeal of Joan Ziegler Ferguson*, Professional Practices Commission, July 13, 1977.

13. *In the Matter of the Appeal of Paul Gordon*, State Board of Education, September 20, 1976.

14. *In the Matter of the Appeal of Jerald Davis*, State Board of Education, August 9, 1976.

15. *In the Matter of the Appeal of Jim Phillips*, Professional Practices Commission, July 14, 1977.

16. *Evans v. Page*, 516 F.2d 18 (8th Cir. 1975).

17. *Howell v. Winn Parish School Board*, 321 So.2d 420 (La. 1975).

18. *Fernald v. City of Ellsworth Superintending School Committee*, 342 A.2d 704 (Me. 1975).

19. *Lucciola v. Commonwealth of Pennsylvania Secretary of Education*, 360 A.2d 310 (Pa. 1976).

20. *Aubuchon v. Gasconde County R-1 School District*, 541 S.W.2s 322 (Mo. 1976).

21. *Pell v. Board of Education of Union Free School District No. U-46*, 222 N.E. 2d 321 (N.Y. 1974).

22. *Johnson v. United School District Joint School Board*, 191 A.2d 897 (Pa. 1963).

23. *Potter v. Richland*, 534 P.2d 577 (Wash. 1975).

24. *Yuen v. Board of Education of School District No. U-46*, 222 N.E.2d 570 (Del. 1966).

25. *Board of Education, Mt. Vernon Schools v. Shrank*, 542 S.W.2d 779 (Mo. 1976).

26. *Hickey v. Board of School Directors of Penn Manor School District*, 328 A.2d 549 (Pa. 1974).

27. *di Leo v. Greenfield*, 541 F.2d 949 (2nd Cir. 1976).

28. *Cooper v. Curry*, 399 F. Supp. 372 (Miss. 1975).

29. *Glover v. Board of Education of Macon Community Unit District No. 5*, 316 N.E. 2d 535 (Ill. 1974).

30. *Mortweet v. Ethan Board of Education*, 241 N.W.2d 580 (S.Dak. 1976).

31. *Thompson v. Wake County Board of Education*, 230 S.E.2d 164 (N.Car. 1976).

32. *Di Caprio v. Redmond*, 350 N.E.2d 119 (Ill. 1976).

33. *Thompson, supra*, note 31.

34. *Di Caprio, supra*, note 32.

35. *Jerry v. Board of Education of City School District of City of Syracuse*, 376 N.Y. Supp. 2d 737 (1975).

36. *Wright v. Superintending School Committee, City of Portland*, 331 A.2d 640 (Me. 1975).

37. *Wishart v. McDonald*, 367 F.Supp. 530 (Mass. 1973).

38. *Gary Teachers' Union v. School City of Gary*, 332 N.E.2d 256 (Ind. 1975).

39. *Caravello v. Board of Education, Norwich City School District, Chenango County*, 369 N.Y.S.2d 829 (1975).

40. *Gaylord v. Tacoma School District No. 10*, 559 P.2d 1340 (Wash. 1977).

41. *Morrison v. State Board of Education*, 461 P.2d 375 (Cal. 1969).

42. *Board of Education of Long Beach Unified School District of Los Angeles County v. Millette*, 133 Cal. Rptr. 275 (1976).

43. *Burton v. Cascade School District Union High School No. 5*, 512 F.2d 850 (9th Cir. 1975).

44. *Acandora v. Board of Education of Montgomery County*, 359 F.Supp. 843 (Md. 1973).

45. *Gish v. Board of Education of Borough of Paramus Bergen County*, 366 A.2d 1337 (N.Y. 1976).

46. *Board of Trustees of Compton Junior College District v. Stubblefield*, 94 Cal. Rptr. 318 (1971).

47. *Carrao v. Board of Education, City of Chicago*, 360 N.E.2d 536 (Ill. 1977).
48. *Denton v. South Kitsap School District*, 516 P.2d 1080 (Wash. 1973).
49. *Obermeyer v. School Board, Independent School District No. 282*, 247 N.W.2d 919 (Minn. 1976).
50. *Goldien v. Board of Education of Central School District No. 1, Towns of Brookhaven and Smithtown*, 357 N.Y.S.2d 867 (1974).
51. *Fisher v. Snyder*, 346 F.Supp. 396 (N.D. Neb. 1972).
52. *Sullivan v. Meade Independent School District No. 101* 530 F.2d 799 (8th Cir. 1976).
53. *Sedule v. Capital School District*, 425 F.Supp. 552 (N.D. Del. 1976).
54. *Pordum v. Board of Regents of State of New York*, 491 F.2d 1281 (2nd Cir. 1974).
55. *Board of Trustees of Santa Maria Joint Union High School District v. Judge*, 123 Cal. Rptr. 830 (1975).
56. *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975).
57. *Reinhardt v. Board of Education of Alton Community Unit School District No. 11*, 311 N.E.2d 710 (Ill. 1974).
58. *Jarvella v. Willoughby – Eastlake City School District Board of Education*, 233 N.E.2d 143 (Ohio, 1967).
59. *Mailboux v. Kiley*, 323 F.Supp. 1387 (Miss. 1971).
60. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
61. *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969).
62. *Lindros v. Governing Board*, 108 Cal. Rptr. 188 (1972).
63. *Caffas v. Board of Education of School Directors of the Upper Dauphin Area School District*, 353 A.2d 898 (Pa. 1976).
64. *Landi v. West Chester Area School District*, 353 A.2d 895 (Pa. 1976).
65. *Barnes v. Fair Dismissal Appeals Board*, 548 P. 2d 988 (Ore. 1976).
66. *Jerry, supra*, note 35.
67. Opinion No. 73-141.
68. *Matter of Appeals of Helen Austin, Diana Burell, and David Greear*, State Board of Education, August 12 1975.
69. *In the Matter of the Appeal of Jewledean Adair*, State Board of Education, August 29, 1977.
70. *Conte v. School Committee of Methuen*, 356 N.E.2d 261 (Mass. 1976).
71. *Austin, Burrell, Greear, supra*, note 68.
72. *Oldham v. Drummond Board of Education of Independent School District No. I-85*, 542 P.2d 1309 (Okl. 1975).
73. *In the Matter of the Appeal of Randa Bloomfield*, State Board of Education, December 17, 1975.
74. 25 O.S. Supp. 1977 Sections 301 through 314.
75. *In the Matter of the Appeal of Warren Melson*, State Board of Education, September 4, 1975.
76. *Mt. Healthy City School District Board of Education v. Doyle*, 50 L.Ed.2d 471 (1977).
77. *Pickering v. Board of Education*, 391 U.S. 563 (1968).
78. *Birdwell v. Hazelwood School District*, 491 F.2d 490 (8th Cir. 1974).
79. *Brubaker v. Board of Education of School District 149, Cook City, Ill.*, 502 F.2d 973 (7th Cir. 1974).
80. *Gray v. Union City Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975).
81. *Gilberton v. McAlister*, 403 F.Supp. 1 (Conn. 1975).
82. *Bertot v. School District No. 1*, 522 F.2d 1171 (10th Cir. 1975).
83. *Ibid.*
84. *Dosher v. Seminole Consolidated School District No. 1*, 377 F.Supp. 1170 (N.D. Tex. 1974).
85. *Spano v. School District of Borough of Brentwood*, 316 A.2d 657 (Pa. 1974).
86. *Amburgey v. Cassady*, 507 F.2d 728 (6th Cir. 1974).
87. *Petrunti v. Board of Education of Brick Township*, 319 A.2d 262 (N.J. 1974).
88. *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92 (5th Cir. 1974).
89. *Adams v. Campbell City School District*, 511 F.2d 1242 (10th Cir. 1975).
90. *Sullivan v. Meade, supra*, note 52.
91. *Keckeisen v. Independent School District No. 612*, 509 F.2d 1062 (8th Cir. 1975).